

**SUPREME COURT
OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES

RELENTLESS, INC., ET AL.,)
 Petitioners,)
 v.) No. 22-1219
 DEPARTMENT OF COMMERCE, ET AL.,)
 Respondents.)

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 22-1219,
5 Relentless versus the Department of Commerce.

6 Mr. Martinez.

7 ORAL ARGUMENT OF ROMAN MARTINEZ

8 ON BEHALF OF THE PETITIONERS

9 MR. MARTINEZ: Mr. Chief Justice, and
10 may it please the Court:

11 For too long, Chevron has distorted
12 the judicial process and undermined statutory
13 interpretation. It should be overruled for
14 three reasons.

15 First, Chevron violates the
16 Constitution. Article III empowers judges to
17 say what the law is. It requires them to
18 interpret federal statutes using their best and
19 independent judgment.

20 Chevron undermines that duty. It
21 reallocates interpretive authority from courts
22 to agencies, and it forces courts to adopt
23 inferior agency constructions that are issued
24 for political or policy reasons. In doing so,
25 Chevron blocks judges from serving as faithful

1 agents of Congress. It mandates judicial bias
2 and encourages agency overreach. And by
3 removing key checks on executive power, it
4 threatens individual liberty.

5 Chevron also violates the APA. The
6 most straightforward reading of Section 706
7 requires de novo review of legal questions.
8 Congress put constitutional and statutory
9 interpretation on equal footing, and it required
10 independent legal judgment as to both. As
11 Justice Scalia wrote, the APA's text
12 contemplates that courts, not agencies, will
13 authoritatively resolve ambiguities in statutes.

14 And, third, this Court's only
15 justification for Chevron is the implied
16 delegation theory, but that theory is a fiction.
17 There's no reason to think that Congress intends
18 every ambiguity in every agency statute to give
19 agencies an ongoing power to interpret and
20 reinterpret federal law in ways that override
21 its best meaning. In this case, the agency
22 misinterpreted the MSA to force struggling
23 fishermen to pay up to 20 percent of their
24 annual profits to federal agents.

25 The government says that even if all

1 nine of you agree with us that the agency's
2 construction is worse than ours, you should
3 nonetheless defer to that construction and
4 uphold their program under Chevron. That's not
5 consistent with the rule of law. If we have the
6 best view of the statute, we should win this
7 case.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: Mr. Martinez, how
10 much deference is in tension with the judicial
11 role?

12 MR. MARTINEZ: I think it's very much
13 in tension, Your Honor.

14 JUSTICE THOMAS: No. How much would
15 it require? I mean, your argument is that
16 Chevron deference is problematic. But how do we
17 determine how much deference is too much
18 deference?

19 MR. MARTINEZ: I think you've
20 certainly crossed the line when you have a rule
21 that says that we're going to allocate
22 interpretive authority from -- from Article III
23 courts to an agency. And so, when -- when
24 you've got deference that amounts to that, which
25 is what Chevron deference is, then I think

1 you've -- you've crossed the line because what
2 you've really done is --

3 JUSTICE THOMAS: I think what I'm
4 trying -- what I'm asking is, how do we know
5 where the line is? We show deference. You --
6 there's Skidmore deference.

7 MR. MARTINEZ: Sure.

8 JUSTICE THOMAS: We are deferential in
9 fact finding, et cetera. So I'm just trying to
10 determine whether you're saying that we -- if
11 it's not de novo review --

12 MR. MARTINEZ: Right.

13 JUSTICE THOMAS: -- without any
14 presumptions or deference, then it's
15 problematic.

16 MR. MARTINEZ: I -- I think deference
17 becomes problematic when it requires a judge to
18 say that the law means X when really the judge
19 thinks the law means Y. I think Skidmore
20 deference is not problematic because it doesn't
21 require that. Skidmore deference essentially
22 says -- and we would be very comfortable with
23 Skidmore -- that because the agency has a -- has
24 an important role to play in the process, often
25 the agency has helped draft the statute, the

1 agency has knowledge of the policy context
2 surrounding the statute and its implementation.

3 Of course, courts should pay special
4 attention to what agencies say, but the agency
5 ultimately has to bring its expertise to bear in
6 a way that's persuasive. And if the -- the
7 court isn't persuasive, if the court thinks that
8 the law means X even though the agency thinks
9 the law means Y, then the court needs to go with
10 the best interpretation of the statute, just
11 like it does in every other --

12 CHIEF JUSTICE ROBERTS: Well --

13 MR. MARTINEZ: -- area of statutory or
14 constitutional --

15 CHIEF JUSTICE ROBERTS: -- let's --

16 MR. MARTINEZ: -- interpretation.

17 CHIEF JUSTICE ROBERTS: -- let's
18 suppose the statute says the Department of
19 Transportation will set length limits for trucks
20 that are reasonable.

21 MR. MARTINEZ: Right.

22 CHIEF JUSTICE ROBERTS: Is that a
23 legal question for the court, or is that a
24 policy question for the agency?

25 MR. MARTINEZ: I think that --

1 CHIEF JUSTICE ROBERTS: It's a -- the
2 -- the legal authority says they've got to be
3 reasonable. That's a term that courts apply in
4 many situations.

5 MR. MARTINEZ: I -- I think that a
6 court looking at that statute would try to
7 determine the best meaning of the statute, and
8 the best meaning of the statute there would be
9 that -- that the use of the term real --
10 "reasonable" confers upon the agency discretion
11 to choose among certain policy options.

12 Now that doesn't mean that the agency
13 can just do whatever it wants because there are
14 limits, and the court has to police that limits.
15 Michigan versus EPA is a good example. Congress
16 used a broad term like "appropriate" and the
17 question was -- which is similar to
18 "reasonable," in giving the agency a -- a range
19 of discretion. But, at the same time, when the
20 agency said, well, we don't have to consider
21 costs in figuring out whether something is
22 appropriate, the court said no, that, as a legal
23 matter, the best interpretation of the word
24 "appropriate" in the context of this statute
25 requires the agency to consider costs.

1 CHIEF JUSTICE ROBERTS: Well, what if
2 the statute says that the agency can regulate
3 truck -- truck length for vehicles that travel
4 in interstate commerce and there's a question
5 whether or not interstate commerce -- the -- the
6 delegation for interstate commerce is satisfied
7 when particular --

8 MR. MARTINEZ: Right.

9 CHIEF JUSTICE ROBERTS: --
10 circumstances are present.

11 MR. MARTINEZ: I -- I think that that
12 would be a case if you're -- if the Court were
13 called upon to interpret what -- if the dispute
14 was about whether -- what interstate commerce
15 means, I think that would be a classic legal
16 question that would be a legal question for the
17 Court. And I think it actually highlights --
18 because interstate commerce is probably there
19 because of the constitutional limitations, it
20 highlights the fact that, really, the same rules
21 should apply to interpreting constitutional --

22 CHIEF JUSTICE ROBERTS: Well, I mean
23 --

24 MR. MARTINEZ: -- provisions as
25 statutes.

1 CHIEF JUSTICE ROBERTS: -- you could
2 imagine -- you could imagine situations where
3 the interstate commerce determination is
4 peculiarly fact-bound, you know, trucks
5 transferring loads and -- at transfer points on
6 the border. Is that in interstate commerce for
7 each one or not? And isn't the policy judgment
8 of the agency pertinent in that situation?

9 MR. MARTINEZ: I think, certainly, the
10 policy judgment of the agency is -- is pertinent
11 in determining sort of the facts because the
12 agency might be on the ground and understand the
13 factual scenario.

14 But I think there's a -- an important
15 legal component to that question, that in any
16 other context, like, for example, if you were
17 interpreting the Constitution, I think the court
18 would -- would quite reasonably think it's its
19 own job to interpret the constitutional
20 requirement of interstate commerce and would --
21 would say -- would give it its best meaning.
22 And I think --

23 JUSTICE KAGAN: Well, let me give you
24 --

25 MR. MARTINEZ: -- the same approach --

1 JUSTICE KAGAN: -- a few more examples
2 along the same lines, Mr. Martinez.

3 Is a new product designed to promote
4 healthy cholesterol levels a dietary supplement
5 or a drug?

6 MR. MARTINEZ: Sorry. Can you give
7 that one more time?

8 JUSTICE KAGAN: A new product designed
9 to promote healthy cholesterol levels, is it a
10 dietary supplement -- that's a statutory term --

11 MR. MARTINEZ: Okay.

12 JUSTICE KAGAN: -- or a drug?

13 MR. MARTINEZ: I -- I think it would
14 depend on -- on the -- the original
15 understanding of the text of that statute in --
16 read in context.

17 JUSTICE KAGAN: You -- you want the --

18 MR. MARTINEZ: And I think that's a --
19 a legal question for a court.

20 JUSTICE KAGAN: -- you think that the
21 court should determine whether this new product
22 is a dietary supplement or a drug without giving
23 deference to the agency, where it is not clear
24 from the text of the statute or from using any
25 traditional methods of statutory interpretation

1 whether, in fact, the new product is a dietary
2 supplement or a drug?

3 MR. MARTINEZ: I --

4 JUSTICE KAGAN: You want the courts to
5 decide that?

6 MR. MARTINEZ: Justice Kagan, I think
7 with respect to that question or any other of
8 the -- a legal question, I think what the court
9 would do, there -- there are going to be hard
10 questions, but I think the court would bring all
11 the traditional tools of construction to bear --

12 JUSTICE KAGAN: They do that --

13 MR. MARTINEZ: -- and would --

14 JUSTICE KAGAN: -- under Chevron.
15 They -- you know, we have made clear all the
16 traditional tools, if you can find an answer,
17 that is the answer. So the court is very rarely
18 in the situation in which you're talking where
19 it thinks the law means X and instead it says Y.

20 If it thinks it means X, under
21 Chevron, as we've understood it and made clear
22 and reigned it in a little bit over these last
23 few years, it's supposed to say X. But
24 sometimes law runs out. Sometimes there's a
25 gap. Sometimes there's a genuine ambiguity.

1 And I -- I don't know. In that case,
2 I would rather have people at HHS telling me
3 whether this new product was a dietary
4 supplement or a drug.

5 MR. MARTINEZ: So, Your Honor, I think
6 a couple things.

7 First of all, I don't think Chevron is
8 a doctrine that only applies to tie-breaker
9 50/50 scenarios. It's never been understood
10 that way. You know, Justice Scalia in his
11 famous article in 1989 --

12 JUSTICE KAGAN: It's not a
13 tie-breaker. There are just some times where
14 you look at a statute and the most honest
15 reading is that there's -- there's -- there's a
16 gap there --

17 MR. MARTINEZ: But --

18 JUSTICE KAGAN: -- because of the
19 limits of language, because of the limits of our
20 ability to predict the future.

21 And so who fills that gap?

22 MR. MARTINEZ: But I -- I guess what I
23 would sort of push back on is I don't think
24 there's a gap if the court looks at the statute
25 and thinks, hey, this is a really hard case,

1 it's a really close statute. Fifty-two percent
2 likely, I think -- you know, I have 52 percent
3 confidence that X is right --

4 JUSTICE KAGAN: I'll give you --

5 MR. MARTINEZ: -- 48 percent likely --

6 JUSTICE KAGAN: -- I'll give you
7 another one, Mr. Martinez. Does the term "power
8 production" -- I'm just -- these are real cases.

9 MR. MARTINEZ: Right.

10 JUSTICE KAGAN: These are -- these are
11 prototypical Chevron cases.

12 MR. MARTINEZ: But --

13 JUSTICE KAGAN: Does the term "power
14 production capacity" refer to AC power that is
15 sent out to the electric grid or DC power that's
16 produced by a solar panel?

17 MR. MARTINEZ: I think same answer as
18 the first hypothetical. But let me try to --
19 let me try to sort of give you a different
20 framework for thinking about this problem.

21 Let's imagine that that statute came
22 to a court before an agency had even acted in
23 the first place. What would a court do? Would
24 a court look at the statute -- a statutory term
25 like that that's a hard -- presents a hard

1 interpretive question and say: Well, this is
2 hard, it's sort of 52/48, it's kind of close. I
3 think the law has run out and I'm just not going
4 to be able to decide this. I think the court
5 would go with the best interpretation.

6 JUSTICE KAGAN: The -- the -- the --
7 the court might -- the court in that case would
8 have to make a choice. But, you see, here, the
9 court can say, you know, the best option is to
10 listen carefully and to defer if it's reasonable
11 and if it's consistent with everything that we
12 know that Congress has said, to defer to people
13 who actually know things about these things --

14 MR. MARTINEZ: But --

15 JUSTICE KAGAN: -- to -- you know, to
16 people who understand the way particular
17 questions fit within a broader statutory and
18 regulatory scheme, to people who have
19 understanding of the policies and of the facts
20 that led to this.

21 I'll give you a third example.

22 MR. MARTINEZ: Can I respond?

23 JUSTICE KAGAN: And this will be my
24 last one, Mr. Martinez, and it's going to be
25 fairest one because it's going to be one you

1 know about, which is Chevron. As a stationary
2 source in the Clean Air Act, does it refer to
3 whole plants or to each pollution-emitting
4 device within the plant?

5 MR. MARTINEZ: We think that the
6 decision in Chevron was -- reflected the best
7 interpretation with much respect to Justice
8 Gorsuch's mother's EPA. We think that that was
9 the best interpretation.

10 But -- but can I just go back and I
11 think what you described earlier about listening
12 to the agency and taking into account all those
13 things, our -- our rule would allow that.
14 That's Skidmore.

15 I think the only difference between
16 our rule and -- and the Skid- -- what -- the
17 Skidmore sort of approach and the Chevron
18 approach is that after listening to the agency's
19 explanation of all the things that you said, if
20 the court isn't persuaded by the agency that the
21 agency's interpretation is correct, Chevron
22 would say you still have to go with the agency.
23 And that's just like a dramatic thing.

24 JUSTICE SOTOMAYOR: But why not?
25 Meaning I -- I think all of the play in

1 disagreement is around the word "ambiguity." I
2 know that there have been some earlier cases
3 that suggested if there were two plausible
4 meanings, you went with the agency meaning. I
5 think we've gone far beyond that.

6 It has to be two reasonable meanings.
7 Assuming -- you -- you make an assumption that
8 there is a best answer. I don't know how you
9 can say there's a best answer when Justices of
10 this Court routinely disagree and we routinely
11 disagree at 5/4.

12 Is the best answer simply a majority
13 answer? I don't think so.

14 MR. MARTINEZ: But, Your Honor, if --

15 JUSTICE SOTOMAYOR: I happen, when I
16 dissent, think the others got it wrong.

17 (Laughter.)

18 JUSTICE SOTOMAYOR: And they often do.

19 (Laughter.)

20 JUSTICE SOTOMAYOR: But putting that
21 aside -- but putting that aside, in those
22 situations, there are two plausible -- not
23 nearly plausible. There are two best answers.
24 And the question is who makes the choice or
25 helps you make the choice.

1 And if the Court can -- can disagree
2 reasonably and comes to that tie-breaker point,
3 and it could be 51/49, it could be 52/53, if
4 it's that close, why shouldn't the person with
5 all of the qualities you spoke about, the entity
6 with all of the qualities, expertise,
7 experience, on-the-ground execution, knowledge
8 of consequences, why shouldn't deference be
9 given to that entity?

10 MR. MARTINEZ: Justice Sotomayor, I
11 think your explanation of ambiguity just now
12 just proves the problem with Chevron because I
13 think what you said is that whenever there's a
14 case, a statutory case in which the members of
15 the Court disagree with one another, that --
16 that's essentially saying the statute is
17 ambiguous because reasonable people can
18 disagree.

19 JUSTICE KAGAN: That's what nobody
20 believes --

21 MR. MARTINEZ: Well --

22 JUSTICE KAGAN: -- about Chevron, Mr.
23 Martinez. As we've described it, if you -- you
24 work hard to figure out a statutory problem.
25 You don't say, oh, it's difficult. Oh, there

1 are two interpretations. Oh, you know, not
2 everybody agrees with this in three seconds
3 flat.

4 You don't say that. You do everything
5 you do, look at the text, look at legislative
6 history if you believe in legislative history.
7 Look at context. Look at every tool you can,
8 and still there are places where we don't know
9 whether this drug is a -- is a -- is a --
10 whether this product is a drug or a dietary
11 supplement, and it's best to defer to people who
12 do know, who have had long experience on the
13 ground, who have seen a thousand of these kinds
14 of situations.

15 And, you know, judges should know what
16 they don't know.

17 MR. MARTINEZ: I -- I agree with that,
18 Justice Kagan. But, with -- with all due
19 respect, I -- I think I understood Justice
20 Sotomayor to be saying that whenever judge --
21 Justices of this Court disagree about the best
22 meaning of the statute, because, obviously,
23 everyone on the Court is reasonable, that shows
24 that there's an ambiguity.

25 If that's the test, which I think was

1 the implication of the question, then that can't
2 be wrong. That's much broader than --

3 JUSTICE SOTOMAYOR: That wasn't --

4 MR. MARTINEZ: -- step one.

5 JUSTICE SOTOMAYOR: -- my implication.

6 My implication was that using all the statutory
7 tools, you can still come up, using them in good
8 faith, using them, you can still come up with no
9 answer --

10 MR. MARTINEZ: Well, I think --

11 JUSTICE SOTOMAYOR: -- with no clear
12 answer.

13 MR. MARTINEZ: -- I -- I think you can
14 can come up with no clear answer because some --

15 JUSTICE SOTOMAYOR: Or no best answer.

16 MR. MARTINEZ: -- because some
17 statutes are hard. But I think you can come up
18 with a best answer, and -- and the reason I
19 think that is because --

20 JUSTICE SOTOMAYOR: Best only because
21 a majority agrees?

22 JUSTICE JACKSON: But --

23 MR. MARTINEZ: No, no, because --
24 because, if you had the same statute with the
25 same interpretive question posed to you without

1 the agency having acted, I don't think you would
2 say there's no answer here. I think you would
3 choose the best answer.

4 JUSTICE GORSUCH: I mean, Mr. Martinez
5 --

6 JUSTICE JACKSON: But, Mr. Martinez --

7 JUSTICE GORSUCH: -- I guess I'm
8 struggling to understand what -- what -- what's
9 at stake here given the questions because, as I
10 understand Justice Kagan's hypotheticals, which
11 are -- are hard ones, that one option would be
12 to say it's ambiguous and, therefore, the agency
13 always wins. That -- that's what I understood
14 Chevron to mean at least coming in here today.

15 Another would be to listen carefully
16 to both sides and provide special weight under
17 Skidmore to a coequal branch of government's
18 views about the law, which one would think we
19 would do anyway, and that they would have --
20 have -- be considered great weight in arriving
21 at the best answer and that that's what a court
22 would do if -- if there were no interpretive
23 principles advanced by the executive branch, if
24 there hadn't been some sort of rule or
25 adjudication.

1 Is that -- is that correct?

2 MR. MARTINEZ: I -- I think that's
3 correct. And I think the difference between the
4 Skidmore approach that you just laid out and the
5 Chevron approach is just, at the end of the day,
6 once you've considered all the expertise and all
7 the information the agency has to bear --

8 JUSTICE GORSUCH: Who decides?

9 MR. MARTINEZ: Who decides? Who -- is
10 the judge persuaded or not persuaded?

11 JUSTICE GORSUCH: Is the judge
12 persuaded at the end of the day, with proper
13 deference given to a coequal branch of
14 government, or does the judge abdicate that
15 responsibility and say automatically whatever
16 the agency says wins?

17 MR. MARTINEZ: Right, even -- even if
18 the judge is not persuaded.

19 JUSTICE JACKSON: But, Mr. Martinez --

20 JUSTICE GORSUCH: And then -- and then
21 --

22 JUSTICE JACKSON: -- doesn't that --

23 JUSTICE GORSUCH: -- and then if I
24 might just -- just finish up, what -- what's the
25 effective difference of that? It seems to me

1 that in the first case, when -- when a judge
2 says here's the law, it's settled, we're done,
3 right? It can be appealed, but at the end of
4 the day, if the Supreme Court of the United
5 States upholds that interpretation, we're
6 finished.

7 Whereas, under the Chevron approach,
8 are we finished?

9 MR. MARTINEZ: No.

10 JUSTICE GORSUCH: What happens?

11 MR. MARTINEZ: I think the agency can
12 overrule what the court said. The agency can
13 overrule what itself said. I think that's a
14 very strange thing, that in every other area of
15 statutory interpretation, we understand the law
16 to have one fixed meaning and the goal is to try
17 to figure out that fixed meaning, but Chevron by
18 design creates this world in which the agency is
19 -- is -- because there's this zone of
20 discretion, the -- the agency and ambiguity, the
21 agency can kind of flip-flop and then force
22 courts to flip-flop with them.

23 JUSTICE GORSUCH: And I'm struck on
24 that score by the Brand X case, which involved
25 broadband, in which this Court said, okay,

1 agency, you automatically win with respect to
2 one interpretation of the Bush administration, I
3 believe it was, and then, of course, the next
4 administration came back and proposed an
5 opposite rule.

6 MR. MARTINEZ: Right.

7 JUSTICE GORSUCH: And then the next
8 administration came back and flipped it back
9 closer to the first. And as I understand it,
10 the present Administration is thinking about
11 going back to where --

12 MR. MARTINEZ: That's -- that --
13 that's exactly right.

14 JUSTICE GORSUCH: -- where we started.

15 MR. MARTINEZ: That's exactly right,
16 Justice Gorsuch, and I think it -- it plays up
17 the real problem. Chevron really is a
18 reliance-destroying doctrine. Imagine if you're
19 a person or a regulated entity and you're trying
20 to figure out what the law is. You should be
21 able to rely on the best interpretation of the
22 law and not have to, you know, check the -- the
23 C.F.R. every couple years to see if the law has
24 somehow changed, even though Congress hasn't
25 acted.

1 JUSTICE GORSUCH: And that's the delta
2 between Skidmore and Chevron?

3 MR. MARTINEZ: I think -- I think
4 that's right. I mean, Skidmore, I think, would
5 allow for -- for courts to give meaningful
6 weight and consideration to -- to persuasive
7 opinions by agencies. The only thing Skidmore
8 doesn't do is require a court to give up its --
9 its interpretive -- ultimate interpretive say
10 and defer to an interpretation that is not
11 persuasive.

12 JUSTICE GORSUCH: Thank you.

13 JUSTICE JACKSON: Mr. Martinez, what
14 -- what I'm stuck on is what seems to be an
15 assumption in your argument that every question
16 posed with respect to interpreting --
17 interpreting a statute is a legal one.

18 I see Chevron as doing the very
19 important work of helping courts stay away from
20 policymaking, and so I -- I'd like for you to
21 sort of think of it through that lens and help
22 me understand why, if we do away with Chevron's
23 framework, we won't have a problem of courts
24 actually making a policy decision.

25 So Justice Kagan gave you a number of

1 examples, and I think the reason why those
2 examples are hard or why they're ambiguous or
3 whatever is because, at bottom, they're not
4 asking legal questions; they're asking policy
5 questions. How is it that, you know, stationary
6 source is to be defined? That's not really a
7 legal question. I mean, there could be several
8 reasonable ways of interpreting that. And at
9 the end of the day, I think the way I've been
10 thinking about Chevron is Congress has given
11 that policy choice to the agency.

12 And my concern is that if we take away
13 something like Chevron, the court will then
14 suddenly become a policymaker by majority rule
15 or not, making policy determinations. So how
16 can we avoid that?

17 MR. MARTINEZ: So we agree, obviously,
18 that -- that courts should not be in the
19 business of policymaking. And I think the whole
20 enterprise of statutory interpretation, when
21 properly understood, is -- is designed to take
22 courts out of policymaking because what the
23 court is trying to do is -- is act as a faithful
24 agent of what Congress has done and find the
25 best --

1 JUSTICE JACKSON: But isn't that --

2 MR. MARTINEZ: -- interpretation.

3 JUSTICE JACKSON: -- isn't that what
4 Chevron does? I mean, isn't Chevron, step one,
5 even in this very case, asking the question,
6 one, has Congress made that policy
7 determination? So, for example, here, the
8 question is whether or not monitors on the boats
9 have to be paid for by the owner of the boat.

10 I see that as a policy question.
11 Congress could have said yes or no. There's
12 nothing about law really inherently in the
13 question of should the monitors on the boats be
14 paid for by the owners or the government. So
15 step one is has Congress in the statute answered
16 that question.

17 When we say no, everybody agrees
18 that's not in the statute, then we say the
19 agency can make that determination so long as
20 they do so in a reasonable way. And the -- and
21 courts sort of police the boundaries of
22 reasonableness, but whether or not the monitors
23 are paid for is not really a legal question.

24 MR. MARTINEZ: I think the question of
25 whether or not the law allows the agency to --

1 to force the monitors to be paid for by private
2 industry is absolutely a legal question. I
3 agree with you that when Congress --

4 JUSTICE JACKSON: But isn't that the
5 same question as to whether or not -- isn't that
6 just another way of saying, can this policy
7 determination be made by the agency?

8 MR. MARTINEZ: No, I don't think so.
9 I think the difference is when the -- when the
10 -- when the policymaker, whether it's Congress
11 or the agency, is sitting there and trying to
12 figure out, like, what the best policy is, would
13 the world be a better place if industry has to
14 pay for these monitors or not, that's absolutely
15 a policy question.

16 JUSTICE JACKSON: Okay. So that's the
17 question --

18 MR. MARTINEZ: But -- but --

19 JUSTICE JACKSON: -- right?

20 MR. MARTINEZ: No, because, when it
21 comes to a court, the court is not figuring out
22 what the best thing for the world is. The court
23 is figuring out, well, what did Congress
24 actually want here. It's --

25 JUSTICE JACKSON: But I guess I'm

1 afraid that the court really is figuring out
2 what the best thing in the world is if we --

3 MR. MARTINEZ: But -- but --

4 JUSTICE JACKSON: -- look at it
5 through your lens, right, because, if the answer
6 to the question is, you know, should -- should
7 they pay for it or not, the agency has a view,
8 and unless we're deferring to that view, I don't
9 see why we aren't overriding the -- the agency's
10 policy prerogative.

11 MR. MARTINEZ: The -- the question
12 that the court should be answering is not should
13 agency -- should industry pay for the monitors.
14 The question that the court should be answering
15 is, did Congress require or allow agent --
16 industry to be forced to pay for the monitors?
17 And that's a very different question. That's
18 the difference between law and policymaking.

19 And I think the whole assumption and
20 the whole understanding of statutory
21 interpretation under this Court's cases is
22 there's a difference between law and
23 policymaking. Judges are there not to exercise
24 force or will. They're there to exercise
25 judgment. They're -- they're serving as neutral

1 umpires. They're not players on the field.

2 JUSTICE JACKSON: All right. So how
3 does that --

4 JUSTICE BARRETT: Mr. Martinez --

5 JUSTICE JACKSON: -- play out under
6 your interpretation -- so, here, what -- what is
7 the question we're supposed to be answering?

8 MR. MARTINEZ: The question you're
9 supposed to be answering is, did -- does this
10 statute require -- has Congress required --
11 either required the -- the monitors to be paid
12 for by industry, or has it given the agency the
13 authority to make that decision? And I don't
14 think -- I think that is a legal -- both of
15 those versions of that question are legal
16 questions, and the answer is no.

17 JUSTICE BARRETT: Mr. Martinez, can I
18 ask you a question about the line between law
19 and policy? And I want to ask you in the
20 context of one of Justice Kagan's examples, the
21 dietary supplement or drug.

22 Where is the line between something
23 that would be then subject to arbitrary and
24 capricious review and something that's a
25 question of law? Because I'm just wondering

1 whether we could say that the definition of
2 dietary supplement or drug might be something
3 that's a question of statutory interpretation in
4 the context of the statute, but which category
5 any one thing fell in might be a question of
6 policy for the agency.

7 MR. MARTINEZ: Right. I --

8 JUSTICE BARRETT: Is that possible?

9 MR. MARTINEZ: -- I -- I think that's
10 right. I think that would be more of a -- of a,
11 you know, application of law to fact or a
12 factual question. But I think the core question
13 of, like, you know, what is the meaning of
14 dietary supplement, and I forget what the other
15 alternative was, those are legal questions.

16 JUSTICE BARRETT: But whether the
17 particular cholesterol-reducing drug fell --

18 MR. MARTINEZ: Right.

19 JUSTICE BARRETT: -- in one category
20 or the other, I mean, you know --

21 MR. MARTINEZ: That -- that would be a
22 --

23 JUSTICE BARRETT: -- presumably, that
24 depends on how does this function? What is the
25 mechanism by which it decreases cholesterol?

1 MR. MARTINEZ: I -- I think that's
2 right. But I think it's -- I do think it is
3 important to make -- retain the sort of legal
4 component of that question and -- and make sure
5 that the courts have authority over that legal
6 component.

7 JUSTICE BARRETT: I want to ask you
8 something about your Article III argument too.
9 You know, Justice Thomas asked you what the line
10 is. And, you know, courts all of the time make
11 judgments about whether things are reasonable.
12 But I -- I don't understand you to be
13 disagreeing that things like whether
14 something -- that an agency could be tasked with
15 deciding what was the most feasible, most
16 useful, most reasonable.

17 Well, courts could do that too. So is
18 that a delegation of judicial power that would
19 offend Article III in your view, to give those
20 kinds of --

21 MR. MARTINEZ: No, I think --

22 JUSTICE BARRETT: -- decisions to an
23 agency?

24 MR. MARTINEZ: -- I think the way to
25 think about those kinds of -- of statutory

1 provisions would be that the best interpretation
2 of the statute, given the nature of the word
3 "reasonable" in context, is to confer a range of
4 discretion on the agency.

5 And so I think a court in that case --
6 if -- if the agency is operating within the
7 range of discretion, that's arbitrary and
8 capricious review. If the agency is sort of
9 operating at the edges, you have to figure out
10 where the guardrails are. That's the legal
11 question.

12 So, if the -- if the statute says, you
13 know, the agency can pick red, blue, or green,
14 then the choice among those three options is for
15 the agency. But, if you have a legal question
16 like, oh, does pink count as red, that's a legal
17 question.

18 CHIEF JUSTICE ROBERTS: Thank you, Mr.
19 Martinez.

20 How much of an actual question on the
21 ground is this? I saw some study that said we
22 haven't relied on Chevron for 14 years. And
23 Judge Kethledge has written -- he's been a judge
24 for 10 years. He's never invoked Chevron step
25 two.

1 You know, judges are used to deciding
2 things, and when they get around to doing it,
3 they tend to think what they've come up with is
4 not only the best answer, but it's the only
5 answer.

6 (Laughter.)

7 CHIEF JUSTICE ROBERTS: And -- and I
8 just wonder how often this comes up?

9 MR. MARTINEZ: I think it comes up a
10 lot, Your Honor. And this Court hasn't relied
11 on Chevron since 2016, but the lower courts
12 still have to apply it. And I think these two
13 cases, the -- the two that you're going to hear
14 this morning, sort of show what happens when --
15 when courts are applying this doctrine because
16 they're -- they're essentially getting to a
17 point where they don't really have to figure out
18 the best answer and they can just -- you know,
19 instead of asking what does the statute mean,
20 they can ask a different threshold question,
21 which is, is this statute ambiguous enough that
22 -- that we should just, you know, let the agency
23 do the work for us?

24 CHIEF JUSTICE ROBERTS: Thank you.

25 Justice Thomas?

1 Justice Alito?

2 JUSTICE ALITO: Mr. Martinez, would
3 you agree that one of the reasons why Chevron
4 was originally so popular was concern that
5 judges were allowing their policy views,
6 consciously or unconsciously, to -- to -- to
7 influence their interpretation of the statutes
8 in question?

9 MR. MARTINEZ: Yes.

10 JUSTICE ALITO: Why was that fear
11 unfounded? Why do you think now that the fear
12 was unfounded?

13 MR. MARTINEZ: Well, I think three
14 things. First of all, I think the fear has --
15 it's reasonable to think the fear has diminished
16 over time, regardless of what it was then, in
17 large part due to the very salutary developments
18 in the way that this Court and the lower courts
19 generally now think about statutory
20 construction.

21 In the old days, there was a lot of
22 reliance on legislative history and on sort of
23 more free-form analysis that I think made it
24 easier for policy considerations to infect the
25 judicial decision-making process. But this

1 Court has now made clear that, you know, really,
2 we should be text-focused, we should be focused
3 on faithful agency to Congress. So I think that
4 is one difference.

5 I think another difference is courts
6 now have become more appreciative of the fact
7 that we're not just talking about, you know,
8 judicial -- rules of, like, judicially made
9 common law about how to interpret statutes. We
10 have the APA here.

11 Justice Scalia was a big defender of
12 Chevron in its original incarnation but, over
13 time, came to realize that the APA had text that
14 actually bore on this question.

15 And I think, when you're enforcing
16 that text, you come to the same place as our
17 Article III argument, which is that courts have
18 to exercise independent judgment.

19 JUSTICE ALITO: Do you think that the
20 canons of interpretation that we have now and
21 all of the other tools that we have in our
22 statutory interpretation toolkit are like the
23 enigma machine and so we have these statutes and
24 they're sort of written in code and we run them
25 through the enigma machine and, abra cadabra, we

1 have the best interpretation? Do you really
2 think that's how it works?

3 MR. MARTINEZ: I -- I think that what
4 this Court does with respect to the normal
5 canons of construction is it's used the -- it's
6 -- it's generated those canons as rough rules of
7 thumb to help guide the interpretive process
8 because, if the Court believes that the canons
9 best approximate the best original meaning of
10 the statute, especially -- and then there's some
11 canons that -- that sort of are not purely
12 textual canons but that sort of are informed by
13 constitutional -- foundational constitutional
14 values.

15 I think Chevron's very different from
16 that because, with Chevron, you're doing
17 something -- you're not trying to find the best
18 interpretation anymore. You're, in fact,
19 agreeing that you have to impose the not-best
20 interpretation because you have to defer.

21 And so, unlike all the other canons,
22 Chevron is the only one that says to courts, you
23 can stop doing your normal interpretive function
24 and we're going to allocate that interpretive
25 function outside of Article III.

1 JUSTICE ALITO: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Sotomayor?

4 JUSTICE SOTOMAYOR: I counted over, I
5 think -- not I -- the Solicitor General or
6 someone has given us a list of 77 cases in which
7 the Court has used the Chevron approach and
8 interpreted what the law was.

9 Your overruling Chevron puts a
10 question to all those 77 cases.

11 MR. MARTINEZ: No, Your Honor, I
12 think --

13 JUSTICE SOTOMAYOR: No, your out is
14 it's stare decisis now?

15 MR. MARTINEZ: Right. So --

16 JUSTICE SOTOMAYOR: Until the agency
17 does something else? And then people can come
18 back because it's not stare decisis anymore?

19 MR. MARTINEZ: So I think, with
20 respect to the effects of -- of applying normal
21 rules of construction here instead of Chevron,
22 I'd say two things.

23 First of all, the 70 holdings or
24 whatever, the bottom-line holdings in those
25 cases would get stare decisis, so they would not

1 be undermined. So there's no convulsive change
2 of the law with respect to that.

3 JUSTICE SOTOMAYOR: I don't understand
4 how that happens. Once you have a new approach,
5 I'm not sure.

6 MR. MARTINEZ: I --

7 JUSTICE SOTOMAYOR: But let me move on
8 to the second part of my question, which is the
9 cases that come to the Court are usually the
10 hard cases. So you say in the last 14 years
11 we've barely referenced Chevron.

12 And do you know what the breakup is?
13 How often have we consistently upheld the agency
14 in those cases?

15 MR. MARTINEZ: In -- in the cases
16 since 2016?

17 JUSTICE SOTOMAYOR: Yes.

18 MR. MARTINEZ: I -- I don't know the
19 track record on it, Your Honor.

20 JUSTICE SOTOMAYOR: I know, it's
21 interesting.

22 MR. MARTINEZ: But I will say, I mean,
23 there -- there's some prominent --

24 JUSTICE SOTOMAYOR: But -- but putting
25 that aside where we disagree, do you suggest

1 that our disagreement was based on ignoring of
2 Chevron or us doing exactly what you say we
3 should be doing, which is to say this is outside
4 the bounds of reasonableness or around the
5 guardrails because you're going outside of
6 plausible --

7 MR. MARTINEZ: I --

8 JUSTICE SOTOMAYOR: -- of reasonable
9 interpretation?

10 MR. MARTINEZ: -- I think the Court in
11 cases like the American Hospital case or the
12 Digital Realty case, which I think are two
13 really good recent examples, the Court
14 unanimously overturns the lower court decision
15 because it does exactly the right thing. It
16 does all the canons at step one and it -- and it
17 essentially says, like, the statute is clear.

18 But I think what those 9-0 decisions
19 show is how confusing and unworkable Chevron is
20 because the lower courts, you know, purported to
21 do or didn't really do what they were supposed
22 to do and they came to the opposite conclusion,
23 not necessarily because they thought that --
24 that your interpretation wasn't the best but
25 rather because it thought that the statute was

1 ambiguous enough that it required deference.

2 And so it's like a threshold --

3 JUSTICE SOTOMAYOR: Counsel, that
4 judgment is inherent in every question. I mean,
5 that -- that kind of problem is just a part not
6 just of judging but of decision-making, period,
7 of life. And so it's not clear to me that the
8 fact that there may be some ambiguity about
9 what -- how much ambiguity, the question that
10 Justice Thomas asked, it doesn't take away from
11 the basic premise of Chevron, which is a
12 reasonable interpretation within the bounds
13 of -- of common statutory interpretation should
14 be given deference.

15 MR. MARTINEZ: Right. But I do think
16 the ambiguity trigger introduces a whole kind of
17 threshold question that's very hard to apply
18 neutrally. I mean, you have great judges, Judge
19 Kethledge, I think, was referenced. He
20 doesn't -- he never found a case that required
21 him to go past step one.

22 Just Silberman, another great judge,
23 said that in most cases he thought the statute
24 was ambiguous. And if there's that much
25 disagreement, then I think that's a sign that

1 Chevron really isn't workable.

2 And this Court has tried to rein in
3 Chevron in numerous ways, but I think that what
4 all of those efforts show is that you kind of
5 need a secret decoder ring to figure out what
6 the law means under this Court's approach.

7 You have to do step zero. You have to
8 apply need. Then you have to do a robust step
9 one inquiry, taking into account Footnote 9 and
10 taking into account, you know, how much
11 ambiguity is needed.

12 In this -- in the D.C. Circuit, you
13 have to do step one and a half, where you have
14 to figure out whether the agency recognized that
15 the statute was ambiguous.

16 Under Kisor, there's maybe a step
17 three that says you turn off deference when the
18 agency's operating outside of its area of
19 expertise. And then overlying all that you've
20 got the Major Questions Doctrine.

21 And so I think, if -- if -- if that's
22 kind of what --

23 JUSTICE SOTOMAYOR: Well, that's the
24 Court's creation.

25 MR. MARTINEZ: Right. But it's the

1 Court's creation because it's trying to solve
2 the fundamental problem, which is that Chevron
3 is doing something very weird. It's taking
4 interpretive authority that belongs to courts
5 and it's giving it to agencies.

6 So all of these bells and whistles are
7 efforts to kind of claw it back to address the
8 symptoms, but I think it's time for the Court to
9 address the disease, the underlying problem,
10 which is Chevron itself.

11 CHIEF JUSTICE ROBERTS: Justice Kagan?

12 JUSTICE KAGAN: Mr. Martinez, I want
13 you to think of this from Congress's
14 perspective. So I was thinking what is the next
15 big piece of legislation on the horizon and who
16 knows, don't have a crystal ball, but I'm going
17 to say -- I'm going to guess that it's
18 artificial intelligence.

19 So let's imagine Congress enacts an
20 artificial intelligence bill and it has all
21 kinds of delegations, maybe it creates an agency
22 for the purpose or maybe it uses existing
23 agencies and it has all kinds of delegations to
24 that agency or agencies about how to regulate
25 artificial intelligence so that this nation can

1 capture the -- the -- the opportunities but also
2 meet the challenges of that.

3 And then, just by the nature of things
4 and especially the nature of the subject, there
5 are going to be all kinds of places where,
6 although there's not an explicit delegation,
7 Congress has in effect left a gap. It has
8 created an ambiguity. And what Congress is
9 thinking is, do we want courts to fill that gap,
10 or do we want an agency to fill that gap?

11 When the normal techniques of legal
12 interpretation have run out, on the matter of
13 artificial intelligence, what does Congress
14 want, Mr. Martinez?

15 MR. MARTINEZ: I think Congress wants
16 courts to interpret the best interpretation of
17 their --

18 JUSTICE KAGAN: Congress doesn't know
19 --

20 MR. KAGAN: -- apply the best
21 interpretation --

22 JUSTICE KAGAN: -- what that answer
23 means. Congress knows that there are going to
24 be gaps because Congress can hardly see a week
25 in the future with respect to this subject, let

1 alone a year or a decade in the future.

2 And Congress knows that there are
3 going to be things that it writes that it's just
4 not going to be clear how this will apply or
5 what it will mean with respect to countless
6 factual situations that this country will have
7 to address.

8 Does the Congress want this Court to
9 decide those questions, policy-laden questions,
10 of artificial intelligence?

11 MR. MARTINEZ: I -- I don't think
12 Congress wants the Court to do policy. I think
13 Congress wants the Court to do its ordinary
14 function, which is interpret the law and figure
15 -- and apply the best understanding of the law.

16 And I think that the implication of
17 your question is that this is some sort of
18 intentional delegation by Congress that Chevron
19 deference is -- is this implicit delegation.
20 But I -- I don't think that's right. I think
21 many people, including a very insightful article
22 that -- that you wrote 20 years ago, make clear
23 that this is fictional. This is delegation of a
24 fiction.

25 JUSTICE KAGAN: Fictional just

1 means -- is like academic speak for presumed.
2 We are indeed presuming congressional intent.
3 The congressional intent, you know, the -- the
4 delegation that's not explicit on the face of
5 this statute, but what we're thinking is
6 Congress knows things about different
7 institutions, about what they know, about what
8 they're competent with respect to, and Congress
9 knows that this Court and lower courts are not
10 competent with respect to deciding all the
11 questions about AI that are going to come up in
12 the future.

13 And what Congress wants, we presume,
14 is for people who actually know about AI to
15 decide those questions. And also, those same
16 people who know about AI are people who, to some
17 degree in some way, are accountable to the
18 political process. They have constituencies.
19 They have fact-finding abilities. They are
20 obligated to go consult with people. They
21 report to a president, who needs to be elected.

22 In all kinds of ways, both with --
23 with respect to expertise and with respect to
24 their connections to the public and to other
25 policymaking entities, those are the people

1 Congress wants to decide questions about AI. We
2 don't even know what the questions are about AI,
3 let alone the answers to them, we being the
4 Court.

5 MR. MARTINEZ: Justice Kagan, I think,
6 if we're trying to figure out what the -- what
7 the reasonable thing to infer that Congress has
8 presumed, I think the far more reasonable
9 presumption and the one that's most consistent
10 with our constitutional structure is that
11 Congress is going to presume that courts are
12 going to do law and not policy, they're going to
13 pick the best interpretation and enforce the
14 best interpretation as to this statute in the
15 exact same way that they would do it with
16 respect to any other -- any other statute.

17 And I think this case actually -- you
18 know, AI is a trickier example --

19 JUSTICE KAGAN: I mean, but it's --

20 MR. MARTINEZ: -- but talk about this
21 case. Does anyone --

22 JUSTICE KAGAN: -- it's a real
23 example. I mean, this case, you know, whether
24 it's -- it -- it was a correct interpretation or
25 not a correct interpretation of Chevron is

1 really not the issue that we're deciding here.

2 The issue we're deciding here is more
3 like that, is more like the countless policy
4 issues that are going to confront this country
5 in the years and decades ahead. Will courts be
6 able to decide these issues as to things they
7 know nothing about, courts that are completely
8 disconnected from the policy process, from the
9 political process, and, you know, that just
10 don't have any expertise and -- and experience
11 in an area, or are people in agencies going to
12 do that?

13 MR. MARTINEZ: I --

14 JUSTICE KAGAN: That's what this case
15 is about.

16 MR. MARTINEZ: -- I think the
17 constitutional answer is that Congress needs to
18 set the rules with respect to AI. It can
19 delegate some policymaking discretion to
20 agencies, but once the law is written and the
21 interpretive function has begun, then that job
22 is -- is for the courts.

23 And I think this case actually really
24 is a good example because I think the problem
25 with Chevron is that, like, no one really -- I

1 mean, I'm curious to see what the Solicitor
2 General will say about this, but does anyone
3 really think that Congress was presuming that
4 the agency would get to decide the question of
5 who pays for the monitors?

6 JUSTICE KAGAN: Okay. I have one last
7 question. Do you think that Congress could
8 codify -- codify Chevron?

9 MR. MARTINEZ: I -- I don't think so
10 because I think that -- that a statute that
11 codifies Chevron would say, essentially, that
12 the interpretive authority has been reallocated
13 from the court to the agency. I think that --

14 JUSTICE KAGAN: Congress --

15 MR. MARTINEZ: -- interpretive
16 authority --

17 JUSTICE KAGAN: -- cannot decide that
18 in cases -- after all the statutory tools have
19 been used and there remains a gap or an
20 ambiguity, Congress could not decide that it
21 wants people who know something about something
22 to decide the questions that will be left over?

23 MR. MARTINEZ: I -- I think that gives
24 away and -- and would -- would take away from
25 courts and give to agencies core judicial

1 interpretive authority. I don't think Congress
2 could do that. In the same way that Congress
3 couldn't tell the president how to exercise the
4 veto power or the pardon power, it can't tell
5 courts how to do interpretation and to defer to
6 someone else.

7 JUSTICE KAGAN: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Gorsuch?

10 JUSTICE GORSUCH: Do we have to decide
11 that constitutional question?

12 MR. MARTINEZ: I think it makes sense
13 to decide the constitutional question. I think
14 you could --

15 JUSTICE GORSUCH: That wasn't -- do we
16 have to?

17 MR. MARTINEZ: I think you could
18 resolve this case under the APA, and we would
19 certainly welcome an -- an interpretation of the
20 APA that comes out our way, especially if it's
21 informed by constitutional avoidance principles
22 that I think have a lot of salience here.

23 JUSTICE GORSUCH: Are -- does anything
24 in your argument suggest or depend upon the idea
25 that judges should make or decide policy

1 questions about AI or anything else?

2 MR. MARTINEZ: No. We -- we a hundred
3 percent agree that judges should not do policy.
4 We just think that they should do law. And
5 that's in -- Chevron is about legal questions.

6 JUSTICE GORSUCH: Then there was some
7 question about past decisions, and as you
8 pointed out, this Court's moved away from using
9 legislative history to some degree in favor of
10 text, and we've made other changes in our
11 interpretive approaches too without Congress's
12 intervention, for example, in sovereign immunity
13 contexts, returning to the clear statement rule
14 that had preexisted this Court's jurisprudence
15 for 200 years, and then we wandered off into
16 legislative history and circled back around and
17 corrected our own mistake.

18 We had to deal with the question of
19 what to do with those precedents, and our answer
20 was to leave them alone from -- from those
21 ancient regimes, as we --

22 MR. MARTINEZ: Right.

23 JUSTICE GORSUCH: -- called them. Are
24 you asking us to -- to do anything different
25 when it comes to Chevron?

1 MR. MARTINEZ: No, and if I could just
2 explain what -- how I think the world would look
3 with respect to the old cases. I think stare
4 decisis would apply to the holdings of those old
5 cases. I don't think that -- that anything
6 would change. You know, stationary source would
7 still mean what it meant when -- when the Court
8 issued that bottom-line interpretation. And so
9 I don't think that this would -- a ruling in
10 favor of our side would -- would require or
11 entail overturning any of those old cases.

12 I think what we really care about is
13 prospectively, both with respect to the fishing
14 regulation here but also with respect to other
15 cases that come forward to the courts, making
16 sure that courts are the ones doing the
17 interpreting and not agencies.

18 JUSTICE GORSUCH: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Kavanaugh?

21 JUSTICE KAVANAUGH: Several questions.
22 First of all, on Skidmore, there was reference
23 to Skidmore deference, and I guess I don't think
24 that's the right term, that it's respect or pay
25 attention to, but I think, if we throw the term

1 "deference" into Skidmore deference, we're going
2 to walk into another problem --

3 MR. MARTINEZ: Some --

4 JUSTICE KAVANAUGH: -- like the one we
5 have with Chevron deference.

6 MR. MARTINEZ: Some might say
7 "deference" is ambiguous. I think that --

8 (Laughter.)

9 MR. MARTINEZ: -- that it's imprecise.
10 I think the better way -- I think oftentimes,
11 when people say "deference," what they mean is
12 that if you think the answer is X, you should
13 defer to someone else's answer, which is
14 different. I don't think -- I think absolutely
15 that that would be inappropriate. So I would
16 not use "Skidmore deference" because I think it
17 -- it runs the risk of -- of giving that
18 implication.

19 I think that, really, we're talking
20 about very serious consideration of the points
21 that the agency makes, but, ultimately, you have
22 to be persuaded. And if you're persuaded, then
23 that means that you've concluded that the agency
24 has the best interpretation and then you just
25 apply the normal rules.

1 JUSTICE KAVANAUGH: Right. I thought
2 Skidmore was about the power to persuade, not
3 the power to control.

4 MR. MARTINEZ: Exactly.

5 JUSTICE KAVANAUGH: Yeah.

6 MR. MARTINEZ: We -- I agree with
7 that.

8 JUSTICE KAVANAUGH: Okay. On the
9 constitutional issue that Justice Gorsuch and
10 Justice Kagan were raising, you have lots of
11 arguments here, and Mr. Clement does too, for
12 overruling Chevron without reaching the
13 constitutional issue.

14 So I guess why -- why would we reach
15 it? If -- if we agreed with you on overruling
16 Chevron on other grounds, I don't see the need
17 to address the hypothetical that Justice Kagan
18 raised about Congress passing a Chevron-type
19 regime.

20 MR. MARTINEZ: I think three things on
21 that. Like I said earlier, we would certainly
22 welcome overruling Chevron, especially under the
23 APA and especially if informed by constitutional
24 avoidance principles.

25 But I think there are three reasons

1 why you should consider going beyond that to the
2 constitutional holding. There are going to be
3 some cases that, as a technical matter,
4 Section 706 of the APA wouldn't -- doesn't
5 apply. And so, if it's an APA holding, it may
6 be that in those cases there might be lingering
7 uncertainty about whether deference should --
8 should apply to cases that aren't technically
9 under Section 706.

10 I think the second thing is that a lot
11 of the analysis in figuring out what the duty
12 under the APA to interpret the law, I think a
13 lot of that analysis really overlaps with the
14 constitutional points. And I think, if you --
15 if you get to a place where you agree with us on
16 the APA, it's not that far, not that different
17 to ultimately agree with us on the Constitution
18 as well.

19 And then, finally, I would just say
20 that although, of course, this Court often
21 prefers to rule on non-constitutional grounds, I
22 think it's also recognized in cases like Pearson
23 versus Callahan that there's going to be a value
24 and a benefit to the judicial system to
25 providing clarity about what the Constitution

1 means. I think -- I would respectfully submit
2 this is one of those situations.

3 JUSTICE KAVANAUGH: On the question of
4 how much does Chevron matter on the ground, I
5 think you addressed this a little bit by citing
6 Judge Silberman, but do you want to elaborate on
7 that? I mean, are -- there are cases, I assume,
8 that get to Chevron step two pretty regularly.

9 MR. MARTINEZ: Very regularly, Your
10 Honor. It happens all the time. And I think,
11 if a case like this one or two cases like these
12 two can get to Chevron step two, I think that
13 suggests that it's really hard to figure out how
14 Chevron step one is supposed to work.

15 I mean, the Digital Realty case is
16 another great example. That's a case where
17 there was a statutory definition of the term
18 "whistleblower" that required the person to have
19 gone to the SEC and -- and, you know, submitted
20 a -- a complaint, and the government and the
21 lower court concluded that that was ambiguous
22 and that it might actually apply, it was
23 reasonable to read the statute to not require a
24 report to the SEC.

25 So I think there are cases, there are

1 examples like these that come up all the time,
2 and, you know, thankfully, this Court doesn't
3 have to intervene every single time, but the
4 reason that the problem is there is because
5 you've told lower courts how to do their
6 interpretation. And as long as that instruction
7 is out there, there are going to be a lot of
8 cases that get it wrong, and you're not going to
9 want to be in the business of sort of error
10 correction on each one.

11 JUSTICE KAVANAUGH: On the question of
12 how Congress can operate without Chevron, I just
13 want to elaborate on -- have you elaborate on
14 that a little more.

15 My understanding is Congress
16 oftentimes will use terms like "the agency can
17 regulate reasonable limits" or "appropriate
18 limits," and that gives, under State Farm, a lot
19 of discretion to the agency to make choices to
20 do what Justice Kagan was talking about, to
21 think about the world as it exists five years
22 from now or 10 years from now and not have to
23 worry about going back to Congress.

24 So the question really is for Congress
25 and its drafting choices, I think, what kinds of

1 broad, capacious terms it uses, as opposed to
2 using more defined terms or statutory terms --
3 usual kinds of statutory language. Yes, it
4 can't rewrite that. At least that's how I
5 thought Congress could operate in a world where
6 Chevron does not exist.

7 MR. MARTINEZ: I -- I think that's
8 exactly right, Justice Kavanaugh. And I think
9 that, like I said earlier, in -- in those
10 situations, the Court's job is basically
11 figuring out what the best interpretation of
12 that word is. And in many cases, maybe most
13 cases, those types of capacious words are
14 basically -- the best understanding of those
15 words is that Congress is, in fact, conferring
16 the discretion on the agency.

17 That's very different from Chevron,
18 where, instead of having any sort of language
19 like that or express language conferring a
20 delegation, you're -- you're basically applying
21 this fictional implied delegation that -- that
22 is triggered by ambiguity, which is like -- you
23 know, frankly, it's -- it's -- it's not -- it's
24 fictional, it's made up.

25 And so I think a world in which

1 Congress, when it wants to delegate to agencies,
2 needs to be express and use language like that
3 or other language, I think is a better world
4 from the perspective of -- of Article I and from
5 Article III.

6 JUSTICE KAVANAUGH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett?

9 JUSTICE BARRETT: Mr. Martinez, I want
10 to return to the question that Justice Sotomayor
11 raised about stare decisis.

12 So you said that overruling Chevron
13 wouldn't have an effect on the many cases that
14 have gotten to Chevron step two and then
15 deferred to the agency. You said -- am I -- did
16 I understand you correctly?

17 MR. MARTINEZ: Those bottom-line
18 holdings would be right, yeah.

19 JUSTICE BARRETT: Okay. But the
20 bottom-line holdings in those cases, if the
21 Court did defer at step two, are simply that the
22 agency's interpretation was reasonable. And
23 maybe sometimes, like in Brand X, they might
24 even be like, well, we would reach a different
25 interpretation if it were our call -- our call,

1 but it's ambiguous, so the agency can decide.

2 So maybe nothing happens immediately
3 to those cases, but isn't the door then open for
4 litigants to come back and say: Well,
5 "stationary source" really means X or, you know,
6 "broadband" or whatever the specific term was in
7 -- in Brand X.

8 So isn't it inviting a flood of
9 litigation even if for the moment those holdings
10 stay intact?

11 MR. MARTINEZ: So I would say the
12 bottom-line holdings in those cases, I would
13 just quibble slightly, I would -- I would
14 describe the bottom-line holding as being that
15 the agency's action was lawful. And so that's
16 the bottom line.

17 I think it's true that people could
18 come and say, look, the interpretive methods
19 have changed since this bottom-line holding was
20 issued and we think that -- that, you know, a
21 different result now should apply. And -- and
22 that's why courts consider requests to overturn
23 precedent. But I just think that they would
24 apply the same standards that they would apply
25 to other stare decisis inquiries, and I think it

1 would be the rare case that would require --
2 that -- where a court would say this -- this
3 decision not only isn't the best interpretation,
4 but it's like so bad and so practically
5 important that we're going to overturn our own
6 precedent.

7 So I think that would be the
8 safeguard.

9 JUSTICE BARRETT: So, when you say
10 that the bottom-line holdings, you -- you've
11 kind of changed the level of generality, right?
12 If you say the bottom-line holding is that the
13 agency's interpretation is lawful, you think
14 it's not open to people to come back then and
15 say, well, it's actually not lawful, this is
16 wrong. The Court got it wrong because the best
17 interpretation isn't the agency's.

18 MR. MARTINEZ: I -- I think litigants
19 could make that argument, but I think they would
20 have to overcome the normal stare decisis test,
21 which is very hard to overcome, and so they
22 would probably have to show that it's really
23 wrong and really practically important.

24 And I think most courts, and I imagine
25 this Court, is -- is going to find that that

1 threshold is -- is met, like, almost -- very
2 rarely, maybe almost never. And so, as a
3 practical matter, you're not going to be
4 upending, you know, those -- those bottom-line
5 decisions --

6 JUSTICE BARRETT: Okay.

7 MR. MARTINEZ: -- even if you let
8 people in theory come and challenge them, which
9 they can do now.

10 JUSTICE BARRETT: So let me ask you --
11 you -- you just referred to the, you know,
12 serious stare decisis threshold, you know, that
13 would have to be overcome.

14 MR. MARTINEZ: Yeah.

15 JUSTICE BARRETT: So let's talk about
16 the stare decisis threshold here. Why is it
17 different here than it was in Kisor? You know,
18 in Kisor, the Court declined to overrule Auer
19 and the part -- the opinion that was for a
20 majority of the Court was largely it was on
21 stare decisis grounds.

22 So why would a different result obtain
23 here?

24 MR. MARTINEZ: I think my first answer
25 is that the Chief Justice's opinion suggested it

1 might be different and I think the reasons why
2 it's -- it's reason -- it's -- it's -- it really
3 is different is because there are important
4 differences between Chevron and Auer.

5 The most important that I think plays
6 on the reliance question is this idea that
7 Chevron allows and -- and almost like a feature
8 of Chevron, not a bug, is that it encourages and
9 allows agencies to flip-flop.

10 And so the reliance consideration with
11 respect to Chevron is -- is much, you know,
12 weaker for -- for -- for the government's side
13 because the agency is allowed to flip-flop all
14 at once, whereas, with our deference, the idea
15 is that the agency -- it's going to be very hard
16 for the agency to flip-flop. So I think it's
17 more important to correct Chevron because
18 it's -- it has that mistake that Auer doesn't.

19 There are other differences. You
20 know, Chevron is problematic because it lets
21 agencies say what Congress intended or what
22 Congress's meaning was, as opposed to just
23 saying what they themselves meant with the
24 regulation that they themselves enacted.

25 So I think the -- the kind of -- you

1 know, the deference makes more sense when you're
2 deferring to the entity that actually created
3 the provision in question as opposed to
4 deferring to their interpretation of -- of a
5 provision that was created by Congress.

6 I think, in addition, you know,
7 Chevron is not limited to agency expertise.
8 Auer is limited to agency expertise. So Auer
9 is -- is narrower.

10 And then, finally, I do think there's
11 a difference even with respect to the APA where
12 I think the APA more clearly puts constitutional
13 interpretation and statutory interpretation on
14 equal footing, and that might play into the
15 analysis.

16 You know, this Court, the plurality
17 in -- in Kisor sort of emphasized that -- that
18 the APA was enacted after Seminole -- a year
19 after Seminole Rock, and so maybe that was a
20 basis to think that -- that Congress was okay
21 with something that looked like Auer deference.
22 But that's not true here. Chevron came many
23 years after the APA.

24 So I think there are a lot of
25 differences that really flesh out, I think, the

1 important point that the Chief Justice was
2 making, which was that the analysis there
3 doesn't automatically transfer over to Chevron.

4 JUSTICE BARRETT: Thanks.

5 CHIEF JUSTICE ROBERTS: Justice
6 Jackson?

7 JUSTICE JACKSON: So I've heard you
8 say several times that you agree that judges
9 should not be doing policy, they should be doing
10 law. And I guess I too agree with that, and my
11 concern is that it's actually not as easy as it
12 seems to distinguish between the two and -- and
13 that it appears in a lot of your answers that
14 you sort of say, well, you come up with the best
15 answer, it's a legal question. But I'm not so
16 sure it's a legal question as opposed to is it
17 the best under the sort of policy regime.

18 And I think that there's a real
19 separation-of-powers danger here to the extent
20 that you're saying that the judges are deciding
21 whether or not this is something the agency
22 should do or not, whether this is a legal
23 question or not.

24 You know, there's the old saying that
25 when you're a hammer, everything looks like a

1 nail. And I'm concerned that judges are going
2 to look at all of the questions related to a
3 statute and call them legal if we don't have
4 something like Chevron that requires judges to
5 be actually thinking about their proper role
6 relative to this issue.

7 So how can you assuage my concern in
8 that regard?

9 MR. MARTINEZ: So I think two points.
10 I think the first point I would make on the
11 distinction between law and policy and how they
12 kind of maybe seem like they blur together, I
13 think that -- that there are just so many
14 instances in which a court can get a question
15 that comes before it that maybe it involves an
16 agency regime, but the agency hasn't acted yet.

17 And I think the court in that
18 circumstance just does its best. It doesn't
19 have guidance, it doesn't have instructions from
20 the agency. It does its best. And I think,
21 when it does its best --

22 JUSTICE JACKSON: But does it have to,
23 Mr. Martinez? I mean, there are -- there are
24 other regimes in which a court is presented with
25 a question and it identifies it as a policy

1 question that it cannot answer.

2 So what I'm saying is that it's not
3 necessarily true that just because the court
4 gets an issue, it automatically says, oh, this
5 must be legal, I have to act.

6 MR. MARTINEZ: But, if -- if the court
7 got -- just to go back to Justice Kagan's
8 hypothetical, the question of what -- what is a
9 dietary supplement and the agency hadn't acted,
10 I think the court would absolutely give meaning
11 to that. And I don't think the court would
12 think that what it's doing is making policy.

13 JUSTICE JACKSON: Well, let me give
14 you a -- a particular example, all right? In
15 the Food and Drug and Cosmetic Act situation,
16 new drugs can be approved only if an adequate --
17 "adequate and well-controlled investigation"
18 shows that the drug will have its attend --
19 intended effect.

20 This term, what is an "adequate and
21 well-controlled investigation," is it your view
22 that Congress wanted the courts to decide what
23 it means for a study to be adequate or
24 well-controlled?

25 I mean, how would a court go about

1 determining whether that's something it's
2 supposed to be doing or the agency is supposed
3 to be doing?

4 MR. MARTINEZ: I think that the -- the
5 court would -- would do exactly the kind of
6 analysis there that it would do if it had that
7 exact same statute without the agency acting.
8 And I think what that means is the court would
9 go in and it would do everything that -- that we
10 all agree happen -- should happen under step
11 one.

12 I think the only difference is that
13 if, after doing that step one analysis, the
14 court concludes that there's a better view and a
15 less better view, then the court should just go
16 with the better view.

17 JUSTICE JACKSON: But when -- when
18 does the court decide that this is not my call?

19 MR. MARTINEZ: Well, I think at the --

20 JUSTICE JACKSON: I guess that's the
21 part that's dropping out for me in your
22 analysis. You just say, you know, we do a step
23 one analysis and then the court makes the
24 interpretive decision about what this means.

25 And I guess --

1 MR. MARTINEZ: I -- I -- I don't think
2 the court ever says that it's not my call if the
3 question in front of it is a question of
4 statutory interpretation, because I think that's
5 a core job --

6 JUSTICE JACKSON: So every statutory
7 interpretation question is one of law that a
8 court can decide, you're saying?

9 MR. MARTINEZ: Yes, and that --

10 JUSTICE JACKSON: There's never a
11 statutory interpretation question that is one of
12 policy that you see Congress may have been
13 intending the agency to answer?

14 MR. MARTINEZ: I think, by definition,
15 if we're talking about interpreting a statute,
16 then you're talking about a legal question in
17 the same way that if you're talking about
18 interpreting the Constitution, then you have a
19 constitutional question. No one would say that
20 you would apply deference there.

21 JUSTICE JACKSON: So there's never a
22 world you -- maybe we just differ on this. I'm
23 worried about the courts becoming
24 uber-legislators, that when we have a policy --
25 so one way that some of the experts have looked

1 at this, some of the legal -- legal scholars
2 have looked at this, is that they say, when
3 there's an ambiguity, there are actually
4 different kinds of ambiguities.

5 So you might have a situation in which
6 there's a statutory term and it's ambiguous in
7 the sense that there are several reasonable
8 meanings of what "stationary source" might mean,
9 for example, several different ways that you
10 could define that. When you get down to that
11 level of analysis, the question is, who's going
12 to make the choice as between what those
13 meanings are?

14 And I hear you saying there might be a
15 best choice, but I guess, if we're talking about
16 a policy question, there are several reasonable
17 meanings, why should the court be the one to
18 make that determination?

19 MR. MARTINEZ: I --

20 JUSTICE JACKSON: And -- and couldn't
21 we be in a world where Congress intended for the
22 agency to actually decide which choice is best?

23 MR. MARTINEZ: I think where I --
24 where I would just sort of disagree is what you
25 said at the end when you sort of assumed that it

1 was a policy question. I would just say that if
2 it's -- if the question is the meaning of a
3 statutory term, that's an interpretive question
4 that's a legal question and would be treated as
5 a legal question if you got that exact same
6 question before the agency had acted.

7 JUSTICE JACKSON: All right. Let me
8 ask you one more thing about practical
9 implications. So let's say it is, you know, a
10 legal question, as you have analyzed, adequate
11 and controlled investigations. If I'm an agency
12 and I'm trying to be responsible, how is this
13 going to work as a practical matter? Is the
14 agency going to go to court every time it gets
15 one of these undefined terms in a statute and
16 seek, you know, a declaratory judgment as to the
17 meaning of "adequate and controlled" -- and
18 "well-controlled investigations" before it goes
19 forward with its policy?

20 MR. MARTINEZ: No.

21 JUSTICE JACKSON: All right. So the
22 agency can come up with its own definition and
23 implement it and then wait to be sued with
24 respect to that, and -- and every term undefined
25 in a statute we're going to have litigation

1 about?

2 MR. MARTINEZ: No. No, Your Honor. I
3 think what the agency has to do is what everyone
4 else has to do, which is try to figure out what
5 the -- what the law means and then act
6 accordingly, and if someone challenges that,
7 then that'll get sorted out. If there's a -- a
8 stat -- a legal question, a statutory
9 interpretation question, then that'll get sorted
10 out by the courts. But the agency isn't, like,
11 paralyzed --

12 JUSTICE JACKSON: What do we do about
13 the -- the chaos that we talked about in -- in
14 the City of Arlington case that comes from
15 perhaps having different courts, right? We have
16 11 different, you know, jurisdictions that have
17 legal authority. So something like the
18 definition of "adequate and well-controlled
19 investigations," you say the courts will sort it
20 out.

21 Well, first of all, it will take years
22 perhaps for the courts to sort it out. What is
23 the agency supposed to be doing in the meantime?
24 And different courts from all of these different
25 jurisdictions could actually have a different

1 view, as Justice Sotomayor pointed out, of what
2 "adequate and well-controlled investigations"
3 are supposed to do, so -- means.

4 So isn't it sort of impractical and
5 chaotic to have a world in which every undefined
6 term in a statute is subject to litigation if
7 you're trying to govern?

8 MR. MARTINEZ: Well, I -- I don't
9 think it's impractical. I think that to the
10 extent that Justice Kagan's questions sort of
11 indicate that there's actually a relatively
12 small set of cases in which Chevron's going to
13 make a difference, you're going to have that
14 same problem with respect to the cases that
15 maybe 20 years ago under a looser approach to
16 Chevron wouldn't have gotten deference.

17 JUSTICE JACKSON: Wouldn't you have
18 more of a problem in a world in which we've
19 gotten rid of Chevron because it's going to give
20 incentives to parties to raise legal issues that
21 they wouldn't have raised before?

22 MR. MARTINEZ: I -- I don't think it's
23 a problem to -- to have parties, if they think
24 an agency is overstepping the boundaries and if
25 they're right that --

1 JUSTICE JACKSON: No, I understand,
2 but, under a Chevron regime, right, if that's
3 the background rule, then you're going to have
4 parties thinking twice before going down a
5 litigation road with respect to a term because
6 they're going to say, at the end of the day --

7 MR. MARTINEZ: Right.

8 JUSTICE JACKSON: -- the agency has a
9 reasonable interpretation, that's what the
10 court's going to find, so it's not any --

11 MR. MARTINEZ: Right. You're --
12 you're going to have parties being less likely
13 to challenge agency action that is unlawful
14 under the best interpretation of the statute
15 because they know that when they go into court,
16 the judge is not going to apply its independent
17 neutral judgment and instead is going to tilt
18 the scales and defer to the agency.

19 JUSTICE JACKSON: Thank you.

20 MR. MARTINEZ: And --

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 General Prelogar.

24

25

1 ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR
2 ON BEHALF OF THE RESPONDENTS

3 GENERAL PRELOGAR: Mr. Chief Justice,
4 and may it please the Court:

5 The Chevron framework is a bedrock
6 principle of administrative law with deep roots
7 in this Court's jurisprudence. Overruling a
8 precedent is never a small matter, but
9 overruling a precedent as foundational as
10 Chevron should require a truly extraordinary
11 justification, and Petitioners don't have one.

12 They say that Article III requires de
13 novo review of all statutory interpretation
14 questions. But that's flatly inconsistent with
15 precedent going back to the Marshall Court and
16 with the traditional limits on mandamus
17 jurisdiction, which governed most judicial
18 review of executive action in the early
19 republic.

20 They've said that Chevron violates due
21 process. But the application of deferential
22 standards of review doesn't constitute
23 impermissible bias. And they contend that the
24 APA requires de novo review. But that theory is
25 inconsistent with the statute's history and the

1 way it's been understood ever since its
2 enactment, including in the more than 70 cases
3 in which this Court has relied on Chevron to
4 sustain an agency's interpretation.

5 On top of all that, reliance interests
6 in this context are at their apex. Congress,
7 agencies, states, regulated parties, and the
8 American public have all relied on Chevron and
9 the regulations upheld under it to make
10 important decisions that could be upended by
11 overruling that framework.

12 Thousands of judicial decisions
13 sustaining an agency's rulemaking or
14 adjudication as reasonable would be open to
15 challenge, and that profound disruption is
16 especially unwarranted because Congress could
17 modify or overrule the Chevron framework at any
18 time. Congress has many times considered
19 proposals to do so, but it's never taken that
20 step.

21 Instead, Congress has legislated for
22 decades with Chevron as the background rule
23 informing the degree of discretion that Congress
24 has chosen to confer on federal agencies.

25 Just five years ago in *Kisor*, this

1 Court declined similar calls to overrule the
2 Auer deference doctrine based on many of the
3 same flawed arguments that Petitioners are
4 making here. The Court observed that it would
5 be the rare overruling that would introduce so
6 much instability into so many areas of the law,
7 all in one blow. Overruling Chevron would be an
8 even greater and unwarranted shock to the legal
9 system.

10 I welcome the Court's questions.

11 JUSTICE THOMAS: General, Section 706
12 of the APA was not mentioned in Chevron. How
13 would you reconcile the requirements of -- on
14 this -- on federal courts under 706 with your
15 view of Chevron?

16 GENERAL PRELOGAR: Section 706 says
17 that courts should decide all relevant questions
18 of law and interpret statutes, but none of that
19 is inconsistent with the Chevron framework
20 because 706 doesn't prescribe a universal
21 standard of review to govern those kinds of
22 statutory interpretation questions. And the
23 courts are interpreting statutes when they walk
24 through the Chevron framework.

25 First, there's all the work that the

1 Court does at step one of Chevron. That is
2 using the tools of interpretation to identify
3 whether Congress has spoken to the issue in the
4 case and, if so, Chevron said that's the end of
5 the matter. So, in that sense, in a step one
6 case, the Court has, of course, interpreted the
7 statute.

8 But, in a situation where, at the end
9 of that interpretive process, the Court is left
10 with no conclusion that it's actually able to
11 ascertain that Congress has spoken, then, in
12 that circumstance, I think the right
13 interpretation of the statute is that Congress
14 left a gap or maybe created an ambiguity and
15 simultaneously vested the agency with the
16 important responsibility, pursuant to an express
17 delegation, to administer that statute with the
18 regulations that have the force of law.

19 And that's within -- tells the Court
20 what the relevant question of law that's left
21 over to resolve is. It's whether the agency
22 acted within the bounds that Congress itself
23 prescribed.

24 So I don't think there's any
25 fundamental incompatibility with Section 706 and

1 what Chevron dictates about how to think about
2 Congress's delegations.

3 JUSTICE SOTOMAYOR: Can I say,
4 counsel -- General, I know plenty of statutes
5 where Congress uses the word "de novo." It
6 didn't here, correct, in 706?

7 GENERAL PRELOGAR: That's correct.

8 JUSTICE SOTOMAYOR: I thought it, and
9 I do think it, would be revolutionary to say
10 that Congress can't limit judicial review.
11 AEDPA is the quintessential question where we
12 not only give deference to state court
13 decisions, we say even if it got it wrong, if it
14 didn't get it unreasonably wrong, we are
15 superseding the Court's ability to declare a
16 violation of the Constitution and give relief.

17 So I -- I -- I think it would be
18 radical to say that Congress couldn't implement
19 Chevron. In fact, there is legislation to
20 overrule Chevron, requiring de novo review, that
21 hasn't passed. There are statutes that
22 basically don't -- say apply de novo review,
23 correct?

24 GENERAL PRELOGAR: Yes.

25 JUSTICE SOTOMAYOR: And there are

1 statutes that require differential review
2 explicitly to legal questions, correct?

3 GENERAL PRELOGAR: Yes.

4 JUSTICE SOTOMAYOR: Besides Chevron?

5 GENERAL PRELOGAR: Yes.

6 JUSTICE SOTOMAYOR: All right. So now
7 we have -- we're now at 706. And my -- your
8 adversary, your opposing counsel, said that he
9 didn't see that much disruption from overruling
10 Chevron, that nobody would really bring up those
11 old cases.

12 Do you have a view on that?

13 GENERAL PRELOGAR: I think that my
14 friend, it -- it might be easy for him to say
15 that because he is not going to be involved in
16 the endless litigation that I think would result
17 if this Court were to overrule Chevron.

18 I understand his point to be that all
19 of the holdings in those cases will be secure
20 because stare decisis will apply in those
21 contexts. But the important thing to realize is
22 that in those cases, as Justice Barrett's
23 questions emphasized, the Court has decided that
24 what the agency did was reasonable. The statute
25 has essentially been interpreted to vest the

1 agency with discretion such that the agency's
2 regulation is being held lawful or valid on the
3 basis of reasonableness, and I think that that
4 means that litigants will come out of the
5 woodwork seeking to open those decisions and
6 contending that they didn't actually address
7 what they now say is the relevant question, not
8 whether the agency's interpretation is
9 reasonable or whether the regulation can be
10 upheld on that basis, but how the statute should
11 be interpreted without granting any deference to
12 the agency's interpretation.

13 CHIEF JUSTICE ROBERTS: Counsel, I'll
14 ask you the same question I asked your friend.
15 You began by saying Chevron is foundational.

16 We get a lot of statutory
17 interpretations from agencies, and I don't know
18 whether it was 14 or 16 years, we haven't relied
19 on Chevron over that time. I -- I mean, have we
20 overruled it in practice even if we've let the
21 -- had to leave the lower courts to continue to
22 grapple with it?

23 GENERAL PRELOGAR: No, I don't think
24 so, Mr. Chief Justice. It's been eight years
25 since this Court relied on Chevron at step two,

1 but there's no case that my friends have been
2 able to point to where the Court has said that a
3 statute was ambiguous or left a gap and Chevron
4 would otherwise apply, but the Court is not
5 going to defer in that circumstance. I think
6 that that --

7 CHIEF JUSTICE ROBERTS: No. But, I
8 mean, that's simply a function of the fact,
9 when -- when we go through the work of trying to
10 interpret what a statute means, when we get to
11 the end, that seems to be the right
12 interpretation, and --

13 GENERAL PRELOGAR: I agree. Those are
14 step one holdings. So I -- so I think that they
15 are consistent with the Chevron framework. And
16 the fact that this Court hasn't had a step two
17 case in recent years in no way indicates that in
18 those cases where Congress is, in fact, leaving
19 ambiguities or gaps, Chevron no longer sets the
20 right ground rule for understanding the scope of
21 the delegation.

22 JUSTICE KAVANAUGH: Can I ask you
23 about what I see is an internal inconsistency in
24 Chevron itself? It relates to Footnote 9, which
25 is -- instructs that a court should use all the

1 traditional tools of statutory interpretation
2 before getting to step two.

3 My concern about that or my confusion
4 about that is, if you use all the traditional
5 tools of statutory interpretation, you'll get an
6 answer. And we know that because, in cases
7 where we don't have an agency involved and we
8 use those same traditional tools, we get an
9 answer.

10 So how do we deal with Footnote 9,
11 which seems to suggest that you'll never get to
12 step two if you follow Footnote 9 by what it
13 says?

14 GENERAL PRELOGAR: So what the Court
15 said in Footnote 9 is that the Court should use
16 all of the traditional tools to ascertain
17 whether Congress had an intent on the issue.

18 And that, of course, is an important
19 part of this framework because, if Congress
20 actually spoke to the issue, then the agency
21 doesn't have any discretion to act in a way
22 that's contrary to Congress's express direction.

23 JUSTICE KAVANAUGH: Do you think
24 that's different from ascertaining what the
25 statute means?

1 GENERAL PRELOGAR: I think that there
2 can be a relevant difference and it touches on
3 exactly what you were asking about in the
4 context where a court has to do it without an
5 agency.

6 In that circumstance, I think it's
7 absolutely right that the Court is ultimately
8 going to keep working and decide how it thinks
9 the statute should best be administered, even in
10 the circumstance where there might be an
11 ambiguity or a gap to fill.

12 But what Chevron recognizes is that
13 there is a third option available. It's not
14 just Congress spoke to the issue and it
15 necessarily authorized what the agency did or
16 Congress spoke to the issue and it prohibited
17 what the agency did.

18 There is a category of cases and
19 statutes out there where, really, using all of
20 the tools, the best interpretation of the
21 statute is that Congress didn't resolve it. It
22 left that gap or ambiguity and coupled it with
23 this express authorization to the agency to
24 carry that statute into effect. This is
25 Congress and the agencies working together hand

1 in hand to put into effect this --

2 JUSTICE KAVANAUGH: How would you
3 define ambiguity or how would you, if you were a
4 judge, say, yes, this is ambiguous or no, that's
5 not ambiguous?

6 GENERAL PRELOGAR: So I would draw on
7 what the Court said recently in Kisor where it
8 said a statute is ambiguous when the Court has
9 exhausted the tools of interpretation and hasn't
10 found a single right answer.

11 And I recognize, Justice Kavanaugh,
12 and you have expressed these concerns that there
13 are some limits of language here and it's not
14 subject to precise mathematical quantification,
15 but that's because I think it's a standard that
16 inherently requires the application of judgment.

17 And at the end of the day, what the
18 Court should be looking for and asking itself
19 is, did Congress resolve this one? Do I have
20 confidence that actually I've got it, I -- I
21 understand what Congress meant to say in this
22 statute and it meant to proscribe a -- a uniform
23 approach to stationary source, that it has to be
24 plant-wide or it has to be a particular piece of
25 equipment?

1 But, in a circumstance like Chevron
2 itself with stationary source or some of the
3 examples that the Justices have been talking
4 about with reasonable or feasible, I think you
5 can get to the end of that process and a judge
6 could say: I think, actually, the way -- the
7 right way to understand this statute is that
8 it's conferring discretion on the agency to take
9 a range of permissible approaches.

10 JUSTICE KAVANAUGH: Do you -- do you
11 think it's possible for a judge to say, the best
12 reading of the statute is X, but I think it is
13 ambiguous and, therefore, I'm going to defer to
14 the agency, which has offered Y?

15 GENERAL PRELOGAR: No, I think that
16 that would probably --

17 JUSTICE KAVANAUGH: That can't happen?
18 I think that happens all the time.

19 GENERAL PRELOGAR: Well, I think that
20 there are two different ways in which courts use
21 the term "best interpretation of the statute."
22 So, if what you're asking me is, is there a
23 world in which a judge could go through the
24 rigorous step one inquiry, apply all of the
25 tools, and say, I think there's a best

1 interpretation insofar as I think Congress spoke
2 to the issue, but the agency's interpretation is
3 it could be permissible, I recognize there's
4 some doubt here, the answer is no.

5 Chevron does not require a court to
6 ignore what is ascertained doing the step one
7 inquiry. At that point, that is the -- the
8 judge's conclusion that Congress actually spoke
9 to the issue and Chevron is totally clear about
10 this, give effect to it.

11 But, if what you're asking me is, is
12 there a world in which the Court could get to
13 the end of the step one inquiry, decide that
14 Congress hasn't spoken to the issue, and then
15 say, if, in fact, the courts had been given the
16 role of filling the gap, I would have done it
17 differently, I would have exercised whatever
18 discretion that Congress left open in this
19 statute in a different way, even looking to
20 things like the overall objectives in the
21 statutory program as a whole, then yes, of
22 course, in that circumstance, it's -- it's
23 implementing Congress's directives --

24 JUSTICE GORSUCH: I mean, General --

25 GENERAL PRELOGAR: -- for the court to

1 not --

2 JUSTICE GORSUCH: -- I'm sorry to
3 interrupt, but those are two different -- very
4 different views about what qualifies as an
5 ambiguity you've just given us. One is there is
6 a better interpretation. I provide it as a
7 court. The other is: Well, yeah, but I'm going
8 to defer anyway given whatever considerations
9 you want to throw into the ambiguity bucket.

10 And that's exactly the problem that
11 your friends on the other side suggest have
12 persisted in the lower courts for 40 years and
13 why some judges claim never to have found an
14 ambiguity and other equally excellent circuit
15 judges have said they find them all the time.

16 And it's also why, I don't know, maybe
17 a dozen or more circuit judges have written
18 asking us to overrule Chevron. And -- and --
19 and -- and -- and it also may be why one of your
20 colleagues last year said I don't know what
21 ambiguity means at this lectern.

22 And should that be a clue that
23 something needs to be fixed here, that even the
24 federal government at the podium can't answer
25 the question what triggers ambiguity?

1 You've given us two different
2 alternatives today, and so many lower court
3 judges who just want to follow whatever we tell
4 them to do faithfully can't figure it out.

5 GENERAL PRELOGAR: So there's a lot
6 packed in there, Justice Gorsuch, and I want to
7 respond to each of your concerns.

8 First, I would draw from Chevron and
9 Kisor in defining what is an ambiguity. It is
10 when a court has applied the tools of
11 construction and can't ascertain that Congress
12 had an intent on the matter. So I think that
13 that is the core question for a court at step
14 one of Chevron, and if that's the circumstance,
15 that would only ever move a court to applying
16 deference at step two.

17 Now I understand the concern you
18 expressed that maybe lower courts are too
19 reflexively finding that there's ambiguity at --

20 JUSTICE GORSUCH: Well, you gave us a
21 second definition just a moment ago, and --

22 GENERAL PRELOGAR: I was trying to --
23 to explain how I thought that sometimes --

24 JUSTICE GORSUCH: Some -- yeah.

25 GENERAL PRELOGAR: -- in the case law

1 "best interpretation" --
2 JUSTICE GORSUCH: Yes.
3 GENERAL PRELOGAR: -- is used in two
4 different --
5 JUSTICE GORSUCH: Right.
6 GENERAL PRELOGAR: I don't think
7 that's a different understanding of Chevron.
8 JUSTICE GORSUCH: Well --
9 GENERAL PRELOGAR: I think that's
10 really a difference --
11 JUSTICE GORSUCH: -- your -- your
12 friend --
13 GENERAL PRELOGAR: -- between step one
14 and step two.
15 JUSTICE GORSUCH: -- your friend a
16 year ago thought so and -- and -- and lower
17 court judges think so.
18 GENERAL PRELOGAR: So let me respond
19 to the concern --
20 JUSTICE GORSUCH: So you agree --
21 GENERAL PRELOGAR: -- about lower
22 court judges. If you think that they are too
23 readily finding ambiguity, I think the Court
24 could do in this case exactly what it did in
25 *Kisor* --

1 JUSTICE GORSUCH: Haven't -- haven't

2 --

3 GENERAL PRELOGAR: -- issue a course
4 correction --

5 JUSTICE GORSUCH: -- we done that,
6 like -- like, 15 times over the last eight or 10
7 years, say, really, really, really, go look at
8 all the statutory tools, and yet here we have a
9 case, two cases, one in which one court found
10 ambiguity and went to step two and another one
11 which -- well, I can't tell what it did, but
12 there's a pretty good argument it -- it tried to
13 resolve it at step one.

14 So, even in a case involving herring
15 fishermen and the question whether they have to
16 pay for government officials to be onboard their
17 boats, which may call for some expertise, but it
18 doesn't have much to do with fishing or
19 fisheries, it has to do with payments of --
20 of -- of government costs, we -- we -- lower
21 court judges even here in this rather prosaic
22 case can't figure out what Chevron means.

23 GENERAL PRELOGAR: Well, I do think
24 that issuing a reminder to courts about the
25 thoroughness --

1 JUSTICE GORSUCH: Another one?

2 GENERAL PRELOGAR: -- that's necessary
3 at step one could make a difference in this
4 context. And I can just share anecdotally on
5 behalf of the government that we have canvassed
6 the litigating components and looked at the
7 lower court case law.

8 And after Kisor, lower courts granted
9 Auer deference far less frequently, so I think
10 it can matter and that lower courts can get that
11 kind of message if you're worried about it.

12 But, Justice Gorsuch, the other point
13 to add here is that if you are concerned that
14 lower courts have different reactions in trying
15 to implement Chevron at step one, I think it's
16 important to think about the alternative as
17 well. It's not as though, if this Court
18 overruled Chevron, that's going to get rid of
19 statutory gaps or ambiguities.

20 JUSTICE GORSUCH: No, it takes --

21 GENERAL PRELOGAR: They will persist
22 --

23 JUSTICE GORSUCH: -- us back to
24 Skidmore, which Justice Jackson, the most ardent
25 of New Dealers, wrote and that persisted in this

1 Court for 40 years, more or less, after the APA.
2 And the world seemed to continue on its axis
3 just fine.

4 GENERAL PRELOGAR: But it's not going
5 to create greater predictability or stability or
6 consistency across judges.

7 JUSTICE GORSUCH: That's -- that's --

8 GENERAL PRELOGAR: If anything, I
9 think that --

10 JUSTICE GORSUCH: -- an interesting
11 thing to suggest, that Chevron predicts
12 stability, when the whole point -- I didn't see
13 you mention Brand X much in your brief. But I
14 -- I'm sorry to go back there, but -- my good
15 friend, but Brand X is a recipe for instability,
16 isn't it, because each new administration can
17 come in and undo the work of a prior one.
18 They're all reasonable. I mean, my goodness,
19 the American people elect them. Of course,
20 they're reasonable people.

21 (Laughter.)

22 JUSTICE GORSUCH: And -- and --

23 JUSTICE SOTOMAYOR: That may be the
24 first --

25 (Laughter.)

1 JUSTICE GORSUCH: And -- and there we
2 are. And so you never have stability in the
3 law. I mean, if reliance and stability count, I
4 would have thought that Chevron, at least as
5 this Court's understood it, is a recipe for
6 anti-reliance.

7 GENERAL PRELOGAR: So I disagree with
8 that characterization about Brand X, and I think
9 my friends have created, kicked up some dust
10 about exactly what Brand X does --

11 JUSTICE GORSUCH: So you do --

12 GENERAL PRELOGAR: -- and doesn't do.

13 JUSTICE GORSUCH: -- you do endorse
14 Brand X, the government does?

15 GENERAL PRELOGAR: Yes. I think it is
16 a logical follow-on of Chevron, and here is why.
17 As Brand X itself recognizes, if the court has
18 found at step one that Congress spoke to the
19 issue, there's no room under Brand X for the
20 agency to reverse the court or somehow change
21 the underlying meaning of the statute. Instead,
22 the statute has been interpreted at step one and
23 what Congress says goes.

24 It's only in the category of step two
25 cases where Brand X comes into play, and in that

1 circumstance, it's because the court in the
2 prior case has understood the statute to leave a
3 gap or an ambiguity for the agency to fill,
4 considering a range of regulatory approaches.
5 So, in that circumstance too, the meaning of the
6 statute doesn't change. It remains a gap for
7 the agency to fill at time two, and if the
8 agency is running through all of the procedural
9 hoops, which can be quite burdensome in this
10 context, to change its regulatory approach, it
11 is still acting consistently with the --

12 JUSTICE GORSUCH: Or not.

13 GENERAL PRELOGAR: -- with the
14 discretion.

15 JUSTICE GORSUCH: Or not if it -- if
16 it issues an interpretive rule without notice
17 and comment or issues an adjudication. It may
18 or may not be that burdensome, right?

19 So Brand X also says that an agency
20 can overturn a prior judicial interpretation.
21 And I saw that as a circuit judge with respect
22 to an alien who was allowed into the country
23 under the Tenth Circuit's understanding of the
24 law. And the government come back and says, no,
25 you have to overturn your precedent, Tenth

1 Circuit, and he's not allowed in the country.
2 And we had to overrule our judicial precedent.

3 Do you think that's an appropriate
4 understanding of the law too, that judicial
5 precedents, maybe even precedents of this Court,
6 can be overturned by agencies?

7 GENERAL PRELOGAR: It depends on what
8 the judicial precedent held. If it held at step
9 one that that statute was clear, then of course
10 not. But Brand X doesn't require that result.

11 If the prior precedent held that
12 Congress didn't resolve the issue and had
13 delegated to the agency the responsibility and
14 role in administering it and filling the gap,
15 including with the possibility of changing
16 regulatory approaches based on things like
17 change --

18 JUSTICE KAVANAUGH: But the reality --
19 just to pick up on that, the reality is -- you
20 -- you say don't overrule Chevron because it
21 would be a shock to the system, but the reality
22 of how this works is Chevron itself ushers in
23 shocks to the system every four or eight years
24 when a new administration comes in, whether it's
25 communications law or securities law or

1 competition law or environmental law, and goes
2 from pillar to post, like Professor Pierce
3 wrote, and he had been a fan of Chevron. Now
4 he's not because he says it's a source of
5 extreme instability in the law. That's his --
6 his phrase.

7 And it just seems like you just pay
8 attention to what happens when a new
9 administration comes in at EPA, at SEC, at FTC,
10 you name it. It's just massive change. That is
11 at war with reliance. That is not stability.
12 And so I think to hold up stability and reliance
13 is a little tough given just watching how it
14 operates every four years.

15 GENERAL PRELOGAR: Well, let me give
16 you a couple of different reactions to that. I
17 think that that is a small sliver of cases or
18 circumstances. And in the mine run case
19 involving agency regulations, agencies
20 themselves build on those regulations as a
21 foundation. There's no evidence that agencies
22 are out there flip-flopping left and right or
23 doing so on a whim.

24 And it brings me to the important
25 point that to do --

1 JUSTICE KAVANAUGH: I don't think
2 they're -- I'm sorry to interrupt --

3 GENERAL PRELOGAR: No.

4 JUSTICE KAVANAUGH: -- and I'll let
5 you finish. But I don't think they're doing it
6 on a whim. I think they're doing it because
7 they have disagreement with the policy of the
8 prior administration and they're using what
9 Chevron gives them and what they can't get
10 through Congress to do it themselves, self-help,
11 and to do it themselves unilaterally, which is
12 completely inconsistent with bicameralism and
13 presentment to get your policy objectives
14 enacted into law.

15 GENERAL PRELOGAR: But, Justice
16 Kavanaugh, the premise I think that's embedded
17 in that question is the idea that Congress had
18 spoken to that issue. And in a circumstance
19 where Congress didn't resolve it and, in fact,
20 wanted the agency to have flexibility and a
21 range of options, there's nothing inherently
22 problematic or incompatible with our system of
23 government to recognize that agencies can carry
24 out those directives.

25 And just look at

1 "stationary source." You know, that was a
2 circumstance where the Court said, applying all
3 of the tools, Congress didn't have a view on it.
4 It didn't want to foreclose a plant-wide
5 definition. It didn't want to foreclose an
6 equipment-specific definition. And I think it
7 was entirely permissible for the expert agency
8 to come in, take stock of the entire situation,
9 and, yes, take account of the policy goals of an
10 incoming administration to better account for
11 the interests of the regulated parties and give
12 them flexibility. That's just part of
13 Congress's design.

14 JUSTICE JACKSON: After all, you know,
15 taking into account the policy goals of the new
16 administration reflects a democratic structure
17 where we have the new administration being
18 elected by the people on the basis of certain
19 policy determinations.

20 I guess my concern is I suppose
21 judicial policymaking is very stable but
22 precisely because we are not accountable to the
23 people and have lifetime appointments. So, if
24 we have gaps and ambiguities in statutes and the
25 judiciary is coming in to fill them, I suppose

1 we would have a -- something of a separation of
2 powers or policy -- excuse me -- separation of
3 powers concern related to judicial policymaking.

4 Am I wrong to be worried about that?

5 GENERAL PRELOGAR: No. I think that
6 that concern is valid, and I think it's valid
7 along two separate dimensions, and one is to
8 recognize that in these scenarios where we're at
9 Chevron step two, by definition, it's because
10 the statute itself doesn't supply an answer and
11 the court can't ascertain that Congress actually
12 meant to resolve it. And in that circumstance,
13 it's entirely sensible for Congress to give the
14 issue to an agency when it is charged with
15 administering the statute and, of necessity, is
16 going to have to fill the gap along the way.
17 And Congress could quite legitimately want the
18 agency to draw on its policymaking expertise in
19 figuring out the right way to fill the gap.

20 JUSTICE JACKSON: What do -- what do
21 you say to Mr. Martinez, who says we've already
22 characterized that as a question of law because
23 the court was involved at step one in making the
24 determination, and so it seems a little odd -- I
25 think I took this away from his presentation --

1 to suddenly say, when we're in a step two
2 gap-filling world, now we're going to call it a
3 policy question as opposed to a legal one?

4 GENERAL PRELOGAR: So I think you can
5 still characterize it as a legal question while
6 recognizing that in a circumstance, to borrow
7 Justice Kagan's words, where the law has run out
8 and Congress hasn't actually spoken to the
9 issue, the court, if it resolves that issue, is
10 -- is going to have to draw on a set of
11 considerations to inform its judgment.

12 And I wouldn't call it policymaking,
13 but I do think it means that the court can't
14 suggest that the answer it is giving is
15 absolutely dictated on that precise issue by
16 Congress because, by definition, we're in a
17 world where Congress didn't speak to it. So the
18 court will have to take account of a narrower
19 range of circumstances, things like the
20 overarching statutory objectives, to try to fill
21 in the gap.

22 But the point is that when Congress
23 has left that gap and charged the expert agency
24 with the administration role, Congress could
25 have every expectation, and Chevron says

1 Congress has the expectation, that the agency
2 will fill the gap and that the courts will
3 respect it within the bounds of reasonableness
4 that always apply in this context.

5 JUSTICE BARRETT: General Prelogar,
6 most scholars of statutory interpretation
7 consider Chevron to be an interpretive canon,
8 much like clear statement rules, rule of lenity,
9 judicially created. Do you see Chevron that
10 way? And, if so, do you see it as different in
11 kind from any of the other canons of
12 interpretation that we apply?

13 GENERAL PRELOGAR: I do think it is
14 different. I don't conceive of it as a canon.
15 Instead, I think that it is fundamentally rooted
16 in -- in kind of setting the ground rules for
17 how all three branches of the government are
18 operating together.

19 And what I understand the Court to
20 have been doing in Chevron is recognizing that
21 there are legitimate reasons why Congress cannot
22 answer every question itself and why it will
23 want to go hand-in-hand with an agency by
24 charging that agency with administering the
25 statute. And in that circumstance, it's the

1 role of the court to give effect to that.

2 So I think it's not just kind of an
3 interpretive canon, but, rather, it really is
4 grounded in the separation of powers.

5 JUSTICE BARRETT: So is it dependent
6 on a judgment about what Congress would want,
7 one that would have to be empirically tested?

8 GENERAL PRELOGAR: So I don't think
9 that it's getting into Congress's subjective
10 intent, although, certainly, I think the primary
11 rationale that Chevron gave was its appraisal
12 that this is, as an overarching matter, what
13 Congress would have intended when it comes to
14 gaps.

15 And I don't mean to suggest that this
16 means that Congress thinks about each and every
17 gap it's creating in the moment. Sometimes I
18 think it does and it's clear when it says set
19 reasonable rates. It knows that it's not itself
20 prescribing what those rates will be in concrete
21 circumstances. It's leaving gaps and the agency
22 has to fill it.

23 But I think, even in the circumstance
24 where Congress doesn't know it's creating it at
25 the time, someone's going to have to come in

1 after the fact and fill it in, and it's either
2 going to be the agency or it's going to be the
3 Court without deference. And in that
4 circumstance, I think the Court appropriately
5 recognized Congress would want for the agency to
6 do it.

7 JUSTICE BARRETT: And how do we know
8 -- this is -- goes back to that question of what
9 is the trigger of ambiguity that Justice Gorsuch
10 was asking you.

11 So think about a concrete example like
12 Pulsifer, which the United States is on the
13 other side, pending before the Court, turning on
14 what "and" joins together.

15 GENERAL PRELOGAR: We think that one's
16 clear. I'll just put it out there.

17 (Laughter.)

18 JUSTICE BARRETT: So let's -- let's
19 put aside the question of whether, you know, the
20 Department of Justice and the Executive can get
21 to deference in interpreting criminal statutes.
22 Just erase that issue from the picture.

23 Is that the kind of question -- you
24 know, judges below, very smart, very reasonable
25 judges reached different conclusions about what

1 that word in the statute meant. Is that the
2 kind of question then, you know, thinking about
3 Brand X saying, well, it doesn't have to be the
4 best, it just has to be, you know, a plausible
5 reasonable one, is that the kind of statutory
6 question that would trigger ambiguity and step
7 two deference?

8 GENERAL PRELOGAR: So I think it's
9 hard to speak in generalities about this. And I
10 am struggling because, of course, the Court has
11 recognized that the -- the Department of Justice
12 does not get deference in the criminal context.

13 JUSTICE BARRETT: Right.

14 GENERAL PRELOGAR: So, with respect to
15 that particular issue --

16 JUSTICE BARRETT: And it's that
17 statutory structure in a -- in a communication
18 --

19 GENERAL PRELOGAR: Right.

20 JUSTICE BARRETT: -- communication
21 sense.

22 GENERAL PRELOGAR: But I guess what I
23 would say to just try to address the overarching
24 question is that, you know, I think that it's
25 going to be kind of a specific exercise in every

1 case, and I can't say here is the formula I can
2 give you to know when the statutory
3 interpretation exercise at step one runs out and
4 the Court should feel like, I don't have an
5 answer, Congress didn't supply one and when not.
6 I think it's going to vary based on the
7 statutory scheme.

8 But, in each case, the Court should
9 conduct that inquiry, make it a thorough inquiry
10 and take account of all of the relevant aspects
11 of interpretation that can bear on meaning and
12 show that Congress, in fact, did resolve it.

13 That is the role of the Court, and
14 it's the role of the Court likewise to enforce
15 Congress's directions.

16 JUSTICE BARRETT: So that kind of
17 question, putting aside the government's
18 position in *Pulsifer*, so maybe --

19 GENERAL PRELOGAR: Yeah.

20 JUSTICE BARRETT: -- that's an unfair
21 question to ask you, but that kind of question
22 you think would be the kind of question that
23 could -- you know, let -- let's take it outside
24 of what does the word "and" mean.

25 You know, a question of statutory

1 structure, the placement of a comma, you know,
2 that kind of a thing, that is the kind of
3 question that, depending on the circumstance,
4 could trigger step two deference?

5 GENERAL PRELOGAR: I think it
6 conceivably could. Now I want to hold open and
7 acknowledge that the Court has said there are
8 certain types of statutory questions that don't
9 fit within the Chevron framework because there
10 are kind of statute-specific reasons to think
11 Congress wasn't giving this question to the
12 agency.

13 JUSTICE BARRETT: Sure.

14 GENERAL PRELOGAR: I think the Major
15 Questions Doctrine is a species of that. I'd
16 point to the Adams Fruit case as well where it
17 was a judicial review provision and the Court
18 said this wasn't something for the agency to do.

19 But I think, in the mine run case,
20 yes, and -- and to the extent you're saying,
21 well, it feels odd for it to depend on a comma
22 or to turn on the meaning of the word "and,"
23 still I think the inference holds because, in
24 that context, Congress, if it, in fact, has left
25 the ambiguity or the gap, recognizes that the

1 agency is going to have to come up with an
2 answer as part of implementing the --

3 JUSTICE BARRETT: Except a lot of
4 times Congress doesn't intentionally leave the
5 ambiguity or the gap, right? It's just limits
6 of language, limits of foresight.

7 GENERAL PRELOGAR: Yes. And I think a
8 -- so I think a court ultimately, if it's able
9 to ascertain that, although it's not perfectly
10 clear in the statute, you can figure out what
11 Congress intended, give effect to that, that's
12 step one.

13 At least Congress knows that if it's
14 going to unintentionally create ambiguities or
15 gaps, Chevron is the stable background rule.
16 It's been the rule for 40 years. This Court
17 acknowledged in City of Arlington that Congress,
18 in fact, legislates against the background of
19 that rule, and so it knows that with anything
20 it's doing that's unintentional, that will
21 trigger --

22 JUSTICE KAVANAUGH: Can I --

23 GENERAL PRELOGAR: -- deference --

24 JUSTICE KAVANAUGH: -- can I ask you
25 about your --

1 GENERAL PRELOGAR: -- if the
2 predicates are satisfied.

3 JUSTICE KAVANAUGH: I'm sorry. Can I
4 ask you about the phrase "law runs out." One
5 way to think about that would be if you had the
6 same statutory interpretation --

7 CHIEF JUSTICE ROBERTS: Go ahead and
8 finish, sure.

9 JUSTICE KAVANAUGH: Same statutory
10 interpretation issue in a non-agency case, could
11 the Court decide it?

12 And if the answer is yes, the Court
13 could decide it, then the law hasn't run out,
14 so, therefore, you could ask yourself that
15 question in an agency case. If this were a
16 non-agency case, would we come to an answer on
17 this case? And if so, you don't go to step two.

18 What's wrong with that? And if that's
19 not correct, because I don't think you're going
20 to agree with that --

21 (Laughter.)

22 JUSTICE KAVANAUGH: -- how -- how
23 would you define when the law runs out short of
24 that, which I think is a problem, as you said,
25 hard to speak in generalities about this.

1 That's the problem.

2 GENERAL PRELOGAR: Yes. So you
3 predicted my answer. I don't agree that it's
4 only in a circumstance where the statute would
5 be incapable of the Court issuing a decision at
6 the end of day. Of course, if a case comes to
7 the Court and it has to resolve it, it's going
8 to have to do its level best.

9 But what I meant by the law running
10 out is that if the Court has walked through all
11 of the tools of construction and interpretation
12 and doesn't think that Congress actually
13 directly spoke to this issue, Congress itself
14 didn't resolve it, then the kinds of tools the
15 Court is going to have to use will be ones that
16 sound in things like the overarching statutory
17 objectives that Congress revealed as part of its
18 plan.

19 And I think that in a -- a Chevron
20 circumstance, the insight of the Court's opinion
21 there was that the Court doesn't have to go on
22 and itself supply the answer when, actually, the
23 best way to understand Congress having not
24 resolved it itself was to make the primary
25 decisionmaker or the person with the primary

1 role in the first instance to be the agency.

2 JUSTICE KAVANAUGH: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Thomas, anything further?

6 JUSTICE THOMAS: Just a -- a couple
7 questions. You said that in an exchange with
8 Justice Sotomayor and me that Congress could
9 require some deference when it came to questions
10 of statutory interpretation.

11 And in 706, it -- it -- the reviewing
12 court shall decide all relevant questions of
13 law, interpret constitutional and statutory
14 provisions, et cetera. Could Congress also
15 require deference on the part of the court with
16 respect to constitutional issues?

17 GENERAL PRELOGAR: So I think that
18 that would raise distinct issues in light of the
19 different history that would be in play in that
20 kind of hypothetical. There has not been a
21 longstanding history of courts deferring to
22 agencies when it comes to interpreting the
23 Constitution, so I think there could be a unique
24 Article III interest at stake there.

25 But the -- the history runs in

1 precisely the opposite direction when it comes
2 to statutory interpretation, where agencies
3 themselves are charged with administering it
4 because, as we've tried to explain, Chevron was
5 not an innovation, it was not something new.

6 These principles of deference go all
7 the way back to the -- the very founding years
8 of the republic. They're reflected in things
9 like mandamus practice, where virtually all
10 executive action for the first hundred years of
11 our nation's history was reviewed deferentially,
12 and then it was continued in a long line of
13 cases from this Court recognizing specifically
14 that in a circumstance when you have the
15 Executive administering the statute, Congress
16 could delegate and could expect for those
17 delegations to be respected.

18 JUSTICE THOMAS: I think mandamus is a
19 little bit different and the other extraordinary
20 writs in that they -- that you had quite a high
21 hurdle before they became applicable, but back
22 to -- we normally say that this Court reviews
23 questions of law de novo, and that includes
24 statutory and constitutional.

25 How would you distinguish that normal

1 practice from what you're saying?

2 GENERAL PRELOGAR: Well, I think it is
3 more nuanced than that. I certainly take the
4 point that the Court reviews many legal
5 questions de novo, but that's not invariably the
6 case. There can be issues that arise under
7 distinct statutes that set forth more
8 deferential standards of review. AEDPA is a
9 good example of that.

10 It -- there can be circumstances like
11 mandamus where the nature of the action itself
12 dictates a more deferential standard of review.
13 And I just don't think it would be accurate to
14 say as a uniform, across-the-board matter, de
15 novo is the standard that always and invariably
16 applies. That's inconsistent with cases from
17 this Court that were cited in Chevron, going
18 back to the early 1800s, things like Edwards'
19 Lessee versus Darby, where the Court itself was
20 recognizing that in a variety of contexts where
21 you have ambiguity in particular and you have an
22 expert agency charged with administering the
23 statute, deference can be warranted.

24 JUSTICE THOMAS: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice Alito?

1 JUSTICE ALITO: Can you provide a
2 concise definition of what "ambiguity" means in
3 this context?

4 GENERAL PRELOGAR: Ambiguity exists
5 when the court has exhausted the tools of
6 interpretation and hasn't been able to arrive at
7 confidence that there is a right answer that
8 Congress spoke to the issue.

9 JUSTICE ALITO: Well, as Justice
10 Kavanaugh's recent question presented, in cases
11 that don't involve an agency, we never say we
12 have exhausted all of our tools of
13 interpretation and we just can't figure out what
14 this means. So that would seem to suggest you
15 never get to step two.

16 GENERAL PRELOGAR: But the relevant
17 question at step one is whether Congress is, in
18 fact, resolving it or delegating it to the
19 agency. So I agree that in a circumstance where
20 you don't have an agency, the Court can't give
21 effect to any delegation and, instead, the
22 backup option in a situation where an agency
23 would otherwise be available is the Court has to
24 do it, but I don't think that that undermines
25 the very real on-the-ground possibility that

1 Congress is legislating and meaning to give the
2 agency the gap.

3 JUSTICE ALITO: Well, I come back to
4 --

5 GENERAL PRELOGAR: And think about a
6 term like "reasonable."

7 JUSTICE ALITO: I come back to the
8 question of your definition of ambiguity. And
9 what I heard you say the first time was it's
10 when we've used up all our tools and we can't
11 figure out what it means, then it's ambiguous.
12 So do you want to provide an alternative
13 definition?

14 GENERAL PRELOGAR: So I think maybe
15 the best way to try to clarify what the
16 definition I'm trying to give is to use an
17 example of something like a statutory term --

18 JUSTICE ALITO: No, I --

19 GENERAL PRELOGAR: -- like
20 "reasonable."

21 JUSTICE ALITO: -- really would just
22 like a definition so that all the courts that
23 have to apply the regime that you're advocating
24 will be able to apply it in the many different
25 cases that come before them.

1 GENERAL PRELOGAR: The Court gave this
2 definition in Kisor five years ago with respect
3 to Auer deference, and I think it's the right
4 definition to use --

5 JUSTICE ALITO: And what is it?

6 GENERAL PRELOGAR: -- here as well.

7 JUSTICE ALITO: What is it?

8 GENERAL PRELOGAR: When a court has
9 used or exhausted the tools of interpretation
10 and doesn't believe that it reveals a right
11 answer. In that circumstance, Chevron said the
12 right way to think about that statute --

13 JUSTICE ALITO: But I -- I think if
14 you --

15 GENERAL PRELOGAR: -- the real right
16 answer there is a delegation.

17 JUSTICE ALITO: But again, I think you
18 -- you're running into the problem that we never
19 do that in cases that don't involve an agency.

20 GENERAL PRELOGAR: Because in those
21 cases --

22 JUSTICE ALITO: So I think you've got
23 to provide a different -- a different
24 definition. Now, what I heard you say at a
25 couple of times -- a couple of times during your

1 argument was it's when we can't figure out --
2 when we don't -- when we can't figure out what
3 Congress intended. Is -- is that what you mean
4 to say?

5 GENERAL PRELOGAR: That is the inquiry
6 that Chevron prescribes that you should be --
7 and this is drawn from footnote 9, which is
8 another formulation of this, use the tools of
9 interpretation to see if they reveal
10 Congress's --

11 JUSTICE ALITO: What do you mean by
12 what Congress intended? Do you mean -- you mean
13 to say that you get to step two whenever we
14 don't think that a majority of the House and a
15 majority of the Senate had an intent on the
16 specific question that is before the court?
17 Then you'd always get to step two.

18 GENERAL PRELOGAR: No. So I don't
19 think it's about individual legislators' intent.
20 I think the Court in Chevron used the word
21 "Congress," but you're really looking at the
22 statute and what the statute reveals about
23 whether it's resolving an issue or not.

24 JUSTICE ALITO: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

2 JUSTICE SOTOMAYOR: There hasn't been
3 much discussion on why this is entitled to
4 statutory -- to stare decisis consideration.
5 There's been an argument by opposing --
6 Petitioners that it's not because -- it's not
7 really a holding of a case; it's a method only,
8 and we have said in the past that a method that
9 lower courts have to use is subject to change
10 in -- change we can make without considering
11 stare decisis.

12 So could you address that argument?

13 GENERAL PRELOGAR: Yes. And I think
14 that Petitioners have pointed to two relevant
15 types of cases that they suggest just mean stare
16 decisis doesn't apply here or it applies in
17 particularly weakened form. First, they say the
18 Court has sometimes changed the interpretive
19 tools it consults. Things like legislative
20 history might have been in greater favor, at
21 least with some justices, before and maybe have
22 fallen out of favor later.

23 But I don't think that those provide a
24 parallel at all, because the Court has never
25 distilled those kinds of interpretive tools into

1 a governing framework. It's never, for example,
2 dictated to lower courts you should be applying
3 legislative history in all cases. And so I
4 don't think that it has the same kind of roots
5 in the type of binding governing framework that
6 Chevron has, which really has functioned in
7 quite a different way with respect to how you
8 understand and implement Congress's directives.

9 The second case they've pointed to is
10 Pearson, which held, in the context of the
11 Saucier rule, that that was entitled to weakened
12 stare decisis. But there the Court said that is
13 entirely a rule of internal judicial management
14 about how courts decide issues and sequence
15 their decision-making process. It doesn't have
16 outward-looking consequences, and it would be
17 foolish to require Congress to step in to fix
18 it.

19 There, too, I think that the
20 considerations in precisely the opposite
21 direction here because Chevron is not just a --
22 a -- a binding framework about how courts
23 conduct their business; it also gives notice to
24 the legislature about how its statutes will be
25 construed. And if the Court got this wrong when

1 Chevron was decided and was wrong about
2 legislative intent, Congress is there at the
3 ready and is perhaps the best part or
4 institution in government to be able to correct
5 it and actually say, going forward, what it
6 wants the ground rules to be.

7 And the final thing I would say,
8 Justice Sotomayor, is that these were precisely
9 the kinds of considerations that the Court took
10 into account in Kisor in applying the strongest
11 form of stare decisis to Auer deference. My
12 friends have largely ignored Kisor's analysis on
13 this. This was the majority of the Court where
14 the Court said Congress can step in, these
15 deference decisions are balls that are lobbed
16 into Congress's courts, and there are big
17 reliance interests at stake here because there
18 are dozens in that case, here thousands, of
19 decisions that could stand to be displaced and
20 create chaos if Chevron is overruled. So I
21 think that, from a stare decisis perspective,
22 that precedent counts as precedent too.

23 JUSTICE SOTOMAYOR: There -- and you
24 answered the reliance question, because one of
25 the arguments on the other side is no one has --

1 well, the first argument, that the Court hasn't
2 applied Chevron in how many years, and so nobody
3 should have legitimate reliance interests. And
4 the second argument against reliance is that no
5 one should have reliance on a wrong
6 interpretation, basically.

7 GENERAL PRELOGAR: Yes. And I think
8 that those kinds of arguments are inconsistent
9 with Kisor and also inconsistent with what we
10 know about what happens in the real world. You
11 know, there are agency regulations out there
12 that have been on the books for decades. People
13 have made investment decisions on the basis of
14 that. People have decided what contracts to
15 enter into on the basis of that. States in
16 cooperative federalism programs have designed
17 and invested the resources into their share of
18 that program.

19 And all of that could be thrown into
20 disarray if now it can be subject to renewed
21 challenge on the basis that that regulation was
22 upheld using the wrong -- answering the wrong
23 question, not looking at whether it conflicts
24 with some purportedly better interpretation of
25 the statute.

1 JUSTICE SOTOMAYOR: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice Kagan?

3 JUSTICE KAGAN: There's been a fair
4 bit of talk, General, about how because you
5 don't have a formula for saying when there's a
6 gap or ambiguity so that you go to step two or
7 because judges may have different tendencies,
8 you know, which might be temperamental as much
9 as anything else, to find ambiguity, because of
10 that there's going to be some variability. And
11 it's hard to argue that it will be -- there will
12 be some variability, but could you talk about
13 the variability in the alternative scenario?

14 GENERAL PRELOGAR: Yes. And I -- I
15 think that this is a really important point to
16 focus on because, as I was trying to say
17 earlier, in a world without Chevron, it's not as
18 though Congress is always going to speak clearly
19 and it won't leave gaps or ambiguities in
20 statutes, genuine ambiguities where you apply
21 the tools and at the end you are left with no
22 certainty about what Congress was trying to do.

23 And in that circumstance in a world
24 without Chevron, what we'll see is what Justice
25 Alito was suggesting, the courts will have to go

1 on and try to answer the question. But there
2 are 800 district court judges around the nation,
3 and I think it's fair to say they will likely
4 have different takes about what to do in that
5 circumstance and what to give greater weight to
6 and how to ultimately fill the gap in
7 administering the statute.

8 And that's going to create problems
9 for a couple of different reasons.

10 JUSTICE KAGAN: And those differences,
11 to go back to Justice Alito's earlier question,
12 I mean, those differences were part of the
13 impetus for Chevron because those differences
14 were looking awfully ideological in nature,
15 awfully partisan in nature. And Chevron, all
16 the empirical evidence suggests, dampens that
17 kind of ideological division between courts.

18 GENERAL PRELOGAR: That's right.
19 There is good empirical evidence to support that
20 judges have an easier time reaching common
21 ground under the Chevron framework and at least
22 identifying when they can agree that Congress
23 did not itself resolve an issue, than they do
24 when they have to ultimately go on and try to
25 figure out what they are going to say is the

1 bottom line of the best way to put the statute
2 into operation.

3 So I think that that is rooted in
4 Chevron, and it just reflects as well this
5 uniformity concern, one of the basic
6 justifications for Chevron and one of the
7 reasons why this inference of legislative intent
8 is sound, because agencies can provide that kind
9 of uniform rule for the nation, subject to the
10 ground rules of course of judicial review under
11 Chevron. But I think that the alternative world
12 where there's no Chevron is that there will open
13 up wide disputes among the lower courts, maybe
14 on these mine-run statutory interpretation
15 questions in complex programs, things like
16 Medicare and Medicaid, and I think that it could
17 mean that regulated parties are subject to
18 different rules in different parts of the
19 country. You lose the uniformity value, and it
20 diminishes the force of the political
21 accountability value.

22 So I think Congress would have very
23 good reason to think that agencies should do
24 this and that courts should respect it within
25 the bounds of reasonableness.

1 JUSTICE KAGAN: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Gorsuch?

4 JUSTICE GORSUCH: You agree that
5 courts, under the APA, have to review questions
6 of law involving the Constitution de novo?

7 GENERAL PRELOGAR: Yes. I think there
8 might be certain circumstances with respect to
9 certain provisions where more deferential
10 standards apply, but I --

11 JUSTICE GORSUCH: But as a general
12 rule --

13 GENERAL PRELOGAR: -- I certainly
14 agree they don't defer to agencies.

15 JUSTICE GORSUCH: Okay. And -- and
16 you agree that, elsewhere in the law, when posed
17 with questions of law, courts review those de
18 novo, generally speaking?

19 GENERAL PRELOGAR: I think that, in
20 many contexts, it's de novo. Certainly not in
21 all contexts.

22 JUSTICE GORSUCH: The examples you
23 gave, I think, were AEDPA and mandamus, right?

24 GENERAL PRELOGAR: Yes. I think those
25 are two good examples of situations where there

1 are specifications of a standard of review
2 that's more deferential.

3 JUSTICE GORSUCH: I wonder whether,
4 though, those have more to do with remedies,
5 right? In a mandamus case, a court should say,
6 or can say, what the law is. It just can't
7 provide relief unless its conviction about the
8 statute meaning is sufficiently clear. Same
9 thing in AEDPA, that we require a heightened
10 standard before relief is granted. Same thing
11 in sovereign immunity contexts. We may think
12 the statute says the government's liable, but we
13 impose a higher standard before we grant access
14 to the fisc.

15 GENERAL PRELOGAR: So I acknowledge
16 that I think that many of those doctrines do
17 turn on limitations built into the writ or
18 limitations on remedies. I don't think it would
19 be right, Justice Gorsuch, to say that in the
20 mandamus cases, what courts were traditionally
21 doing is saying let me put aside what the
22 executive officer did and just interpret the
23 statute de novo and say what I think the right
24 answer is.

25 And the right answer is the executive

1 was violating the law, but not clearly outside
2 the scope of the executive's authority.

3 JUSTICE GORSUCH: But he could do so,
4 as -- just as we do in the qualified immunity
5 context. There are two steps to that analysis.

6 GENERAL PRELOGAR: But --

7 JUSTICE GORSUCH: You can just go to
8 the second one and resolve it and say, ah, it's
9 not clear, so I can't provide a remedy.

10 GENERAL PRELOGAR: But I think, for
11 Petitioners to succeed on their Article III
12 argument, they have to show not just that you
13 can --

14 JUSTICE GORSUCH: I'm not asking about
15 Article --

16 GENERAL PRELOGAR: -- review de novo,
17 but you have to.

18 JUSTICE GORSUCH: -- I'm not asking
19 about Article III. I'm just asking about the
20 APA and what it means.

21 GENERAL PRELOGAR: Yeah. Okay. So
22 sorry if I misunderstood. I -- I do think,
23 though, that what the history shows at the very
24 least is there has been no fundamental rule in
25 this country leading up to the APA's enactment

1 that you have to review all questions de novo.
2 And that's where the history of the APA really
3 matters.

4 This Court has several times
5 recognized the APA was a restatement of existing
6 judicial practice when it came to review of
7 agency statutory interpretations. And as we've
8 explained, there are really deep roots here, a
9 long line of precedent and history showing that
10 courts will sometimes defer.

11 JUSTICE GORSUCH: Yeah. On -- on
12 those --

13 GENERAL PRELOGAR: So I think to say
14 that --

15 JUSTICE GORSUCH: -- on those, it's --
16 it's absolutely true, you -- you -- you do point
17 out cases like Edwards' Lessee and others where
18 this Court gave respect to the federal
19 government's contemporaneous and uniform
20 interpretation of the statute.

21 And that's exactly what Skidmore does.
22 It gives respect to contemporaneous and uniform
23 interpretations. But Chevron, it doesn't matter
24 whether it's contemporaneous and uniform. It
25 could be novel and out of the blue and

1 inconsistent with everything that came before
2 and it still gets deference, right?

3 GENERAL PRELOGAR: So I -- I disagree
4 with the idea that those cases stand for the
5 more limited principle that's -- that --

6 JUSTICE GORSUCH: Well, I'm -- I'm
7 reading from them, but okay. All right. So
8 let's let --

9 GENERAL PRELOGAR: Well, there are --
10 there are dozens of them.

11 JUSTICE GORSUCH: -- let's let --

12 GENERAL PRELOGAR: So I acknowledge
13 that they use varying formulations, and maybe
14 you can find some that look a little more like
15 Skidmore. I think I have a lot that look a
16 whole lot like Chevron --

17 JUSTICE GORSUCH: Let's say you don't.
18 Then what?

19 GENERAL PRELOGAR: Well, I think I --
20 I just have to dispute the premise because --

21 JUSTICE GORSUCH: No. No, fair
22 enough.

23 GENERAL PRELOGAR: -- look at Gray
24 versus Powell, look at NLRB versus --

25 JUSTICE GORSUCH: Yeah.

1 GENERAL PRELOGAR: -- First
2 Publications.
3 JUSTICE GORSUCH: Yeah.
4 GENERAL PRELOGAR: You know, I think
5 that these are -- these are cases in the 1940s
6 that were leading cases in administrative law.
7 JUSTICE GORSUCH: Oh, I -- I wasn't --
8 I was -- put aside what happened in the '40s
9 because it went back and forth and wound up in
10 Skidmore.
11 GENERAL PRELOGAR: But, at the very
12 least --
13 JUSTICE GORSUCH: But -- but -- but --
14 GENERAL PRELOGAR: -- Justice Gorsuch
15 --
16 JUSTICE GORSUCH: -- but you wanted --
17 GENERAL PRELOGAR: -- where there is
18 no --
19 JUSTICE GORSUCH: -- you wanted to say
20 it's a very old thing, and the old cases don't
21 look anything like Chevron. They look a lot
22 like Skidmore.
23 GENERAL PRELOGAR: I -- I disagree
24 with that. Some of them --
25 JUSTICE GORSUCH: Okay.

1 GENERAL PRELOGAR: -- say you should
2 give it controlling weight, it should tip the
3 balance. They're not saying just pay attention
4 to it if maybe it has the chance of persuading
5 you.

6 JUSTICE GORSUCH: If it -- if it's
7 contemporaneous and if it's uniform, right?

8 GENERAL PRELOGAR: No, not all of the
9 cases --

10 JUSTICE GORSUCH: Okay.

11 GENERAL PRELOGAR: -- pay attention to
12 that fact.

13 JUSTICE GORSUCH: Okay.

14 GENERAL PRELOGAR: Some of them recite
15 that, but others don't.

16 JUSTICE GORSUCH: All right. I'll --
17 I'll go look again. That's fine.

18 GENERAL PRELOGAR: And I just want to
19 add as well --

20 JUSTICE GORSUCH: I -- I have another
21 question, though. Chevron, you emphasize, is --
22 is value-neutral and it'll sometimes favor
23 industries that are regulated and sometimes
24 favor the government.

25 And I can certainly see that in -- in

1 scenarios where we talk about the flip-flop of
2 administrations and new people leave -- come in
3 and replace others and -- and there's a lot of
4 movement from industry in and out of those
5 agencies. I think George Stigler talked about
6 regulatory capture.

7 And I -- I don't worry in a Chevron
8 regime about those people. They can take care
9 of themselves, okay? There is political
10 account, fine.

11 The cases I saw routinely on the
12 courts of appeals -- and I think this is what
13 niggles at so many of the lower court judges --
14 are the immigrant, the veteran seeking his
15 benefits, the Social Security Disability
16 applicant, who have no power to influence
17 agencies, who will never capture them, and whose
18 interests are not the sorts of things on which
19 people vote, generally speaking.

20 And, there, Chevron is almost always
21 and, in fact, I -- I didn't see a case cited,
22 and perhaps I missed one, where Chevron wound up
23 benefitting those kinds of peoples. And it
24 seems to me that it's arguable, and, certainly,
25 the other side makes this argument powerfully,

1 that Chevron has this disparate impact on
2 different classes of persons, and I wanted to
3 give you a chance to respond to that.

4 GENERAL PRELOGAR: Sure, and I have a
5 couple of different reactions to that. You
6 know, one is to say that I, of course,
7 acknowledge that the way that Chevron operates,
8 it gives effect to agency interpretations even
9 in circumstances where that might be
10 oppositional, some of the categories of
11 individuals that you're identifying.

12 But, if it does that, it does that in
13 accordance with Congress's intent and wishes
14 because even my friend agrees that there are
15 certain delegations that Congress can make to
16 agencies and -- and certain gap-filling that
17 agencies can do at least with the broad and
18 capacious terms. And at that point, it's just
19 putting into effect what Congress decided.

20 So I don't think that there is any
21 kind of fundamental flaw in giving effect to
22 Congress's statutes in that regard.

23 JUSTICE GORSUCH: But you've left open
24 the possibility that a judge, if left to his own
25 devices, would say the fairest ruling is in

1 favor of the immigrant, it's in favor of the
2 veteran, and it's in favor of the Social
3 Security Disability applicant, but because of a
4 fictionalized statement about what Congress
5 wanted when it didn't think about the problem,
6 the government always wins.

7 GENERAL PRELOGAR: Well, I think there
8 are a couple of different ways to come at that
9 concern. One is to emphasize again that if it's
10 not just that in the exercise of discretion the
11 Court would think something is fairer and fill
12 the gap that way, but rather the Court thinks
13 actually the reason it's fairer is because I
14 have a -- a -- a sense that Congress spoke to
15 this, I can determine it based on all of the
16 tools, you can --

17 JUSTICE GORSUCH: Well, but we --

18 GENERAL PRELOGAR: -- resolve that at
19 step one.

20 JUSTICE GORSUCH: But -- but that
21 doesn't work, though, because you've said that
22 it doesn't matter whether Congress actually
23 thought about it and that --

24 GENERAL PRELOGAR: Yes. So --

25 JUSTICE GORSUCH: -- and that there

1 are many instances where Congress didn't think
2 about it. And in every one of those, Chevron is
3 exploited against the individual and in favor of
4 the government.

5 GENERAL PRELOGAR: I don't think it's
6 fair to treat that as an exploitation. Congress
7 has been aware of the rules here. It could
8 change Chevron at any time. It could displace
9 it if it thinks that it's being used --

10 JUSTICE GORSUCH: All right.

11 GENERAL PRELOGAR: -- in these
12 circumstances where it's not warranted.

13 CHIEF JUSTICE ROBERTS: Justice
14 Kavanaugh?

15 JUSTICE KAVANAUGH: A few questions.
16 I think the other side's argument suggests that
17 the basic analytical concern at the heart of
18 Chevron is that it treats law as policy and that
19 that's antithetical to our constitutional
20 structure and the rule of law.

21 And that's why the Footnote 9 question
22 is so important, I think, because, if you use
23 the traditional tools in a non-agency case and
24 got an answer, that suggests it's a statutory
25 interpretation question.

1 And you're saying no, you can stop
2 short of that in an agency case at some
3 difficult-to-define point and then treat the
4 rest of the case as a -- as a policy call for
5 the executive branch.

6 And that's treating what was a law
7 question in a non-agency case as a policy
8 question in an agency case, and it's the same
9 question. So it's transforming law into policy.
10 And that's very difficult, I think, to accept if
11 you accept the idea that a premise of the rule
12 of law is that the executive and the judiciary
13 can't just treat the laws passed by Congress as
14 mere expressions of policy that they can change.

15 Respond to that.

16 GENERAL PRELOGAR: So I hear that
17 concern, and I think the way to address that
18 concern is to reinforce the principal in
19 Footnote 9.

20 We agree that that's an important
21 principle. And to the extent that there are
22 agencies out there or lower courts out there
23 that are effectively not giving the -- the
24 effect to Congress's own enactments, then a
25 court can police that and it can put into effect

1 the Footnote 9 principle in a robust way with a
2 rigorous analysis. That's the kind of
3 instruction the Court gave in Kisor.

4 And, Justice Kavanaugh, I think it's
5 not a -- a different question in the agency
6 context and in the non-agency context. What I
7 understand Chevron to be doing is telling the
8 court in the first instance figure out if
9 Congress spoke to this issue, and, if so,
10 implement it. But hold open the possibility
11 that Congress didn't speak to the issue.

12 And in that context, if Congress has
13 given the agency this primary critically
14 important role to administer the statute, that
15 should merit deference if the agency still stays
16 within the bounds that Congress set.

17 In a non-agency case, you don't have
18 the agency to rely on, but you might still end
19 up at the end of the interpretive process
20 thinking Congress didn't precisely speak to this
21 issue, but what is the best I can do to figure
22 out how Congress would have resolved it or what
23 is the interpretation most consistent with the
24 overall statutory scheme here?

25 The right way to resolve this case,

1 Congress, in fact, would know that courts are
2 going to have to do that in a context without an
3 agency, and so it's still following the terms of
4 the statute, but I think it would be a fiction
5 to suggest that what the Court is doing there is
6 just following Congress's explicit directions on
7 the matter --

8 JUSTICE KAVANAUGH: Well, can I ask --

9 GENERAL PRELOGAR: -- because that's
10 at war with the idea that there is genuine
11 ambiguity sometimes.

12 JUSTICE KAVANAUGH: Yeah. I think
13 it's important to distinguish, and I think you
14 would distinguish, statutes that involve legal
15 questions of statutory interpretation and then
16 there are tons of statutes, to go back to the AI
17 example, that explicitly confer broad policy
18 discretion on agencies.

19 GENERAL PRELOGAR: Yes.

20 JUSTICE KAVANAUGH: And that's where
21 State Farm kicks in, and that's where we've
22 always been deferential.

23 GENERAL PRELOGAR: Yes, correct.

24 JUSTICE KAVANAUGH: And you
25 acknowledge those are two different kinds of

1 statutes, a statute that says -- for example,
2 one statute might say no -- no one can catch
3 more than 50 fish today, the next statute may
4 say the agency can define what a reasonable
5 number of fish that can be caught in a
6 particular day. That second statute's
7 conferring broad policy discretion to define the
8 limit on the agency.

9 You agree those are distinct?

10 GENERAL PRELOGAR: Well, I -- I think
11 that one is obviously a clearer bestowal of
12 discretion on the agency, but I think it just
13 shows that Congress can legislate in a variety
14 of ways.

15 And if you think about some of these
16 examples, note --

17 JUSTICE KAVANAUGH: Can I stop you
18 right there? In -- so you agree Congress can
19 legislate broad policy discretion to an agency,
20 can -- can grant broad policy discretion,
21 explicitly through words like "reasonable,"
22 "appropriate" --

23 GENERAL PRELOGAR: Yes --

24 JUSTICE KAVANAUGH: -- "necessary."

25 GENERAL PRELOGAR: -- absolutely.

1 JUSTICE KAVANAUGH: Okay.

2 GENERAL PRELOGAR: And I think that
3 the same question of what does the court do
4 without the agency can sometimes come up in
5 those contexts. If Congress has said, to -- to
6 borrow from the Chief Justice's example,
7 reasonable truck lengths, and, you know, there
8 isn't an agency interpretation of that, the
9 court's going to have to do its best.

10 JUSTICE KAVANAUGH: Right.

11 GENERAL PRELOGAR: But I understood my
12 friend to concede that is actually meaning to
13 create a zone of discretion --

14 JUSTICE KAVANAUGH: Yes. That's a --

15 GENERAL PRELOGAR: -- for the agency
16 to operate in.

17 JUSTICE KAVANAUGH: That's a State
18 Farm question, as I would see it. Okay.

19 Two more questions because I want to
20 make sure the concerns of the other side get
21 aired and you have a chance to respond.

22 So there's some discussion of this
23 would be taking power from the executive and
24 granting it to the judiciary. I guess a
25 different conception of this, of Chevron, is

1 that it's taken power from Congress and shifted
2 it to the executive and allowed the executive,
3 in essence, to unilaterally make policy without
4 Congress.

5 And one of the concerns historically,
6 from the beginning of this country, was
7 unchecked executive power. And you hear
8 presidents criticized all the time, whether
9 it's -- you know, Roosevelt or Reagan or Bush or
10 Obama are criticized for exercising unchecked
11 power. So the concern is, about Chevron, in
12 esse ushering in aggressive assertions of
13 unilateral executive power. And that's the
14 concern that I think the other side has. Not
15 about the judiciary taking power but the
16 judiciary having taken it from Congress and
17 shifted it to the executive, contrary to our
18 usual concerns.

19 GENERAL PRELOGAR: So I disagree with
20 their characterization that Chevron permits the
21 executive to claim power away from Congress and
22 Congress is powerless to do anything about that.
23 You know, in the first instance, of course,
24 Congress has to make the delegation to the
25 agency, and the Court can enforce that. And so

1 Congress knows, as this Court has said in City
2 of Arlington, to speak capaciously when it wants
3 to bestow discretion, to speak plainly when it
4 wants to rein an agency in and resolve an issue
5 itself, and also Congress can change the rules
6 of deference that apply in any context.

7 There have been particular statutory
8 schemes where Congress has said deference
9 doesn't exist in this context, don't apply it,
10 or defer to this agency and not this other
11 agency. So -- so Congress is really in the
12 driver seat here.

13 JUSTICE KAVANAUGH: Well, most -- this
14 is a technical point. Most presidents would
15 veto a bill getting rid of Chevron deference and
16 so -- but that's a technical point. But last --

17 (Laughter.)

18 JUSTICE KAVANAUGH: -- last -- last
19 question, which is there was talk about
20 democratically elected political branches, but I
21 just want to get your agreement on something
22 that I think you'll agree on, which it's the
23 role of the judiciary historically under the
24 Constitution to police the line between the
25 legislature and the executive to make sure that

1 the executive is not operating as a king, not
2 operating outside the bounds of the authority
3 granted to them by the legislature.

4 Do you agree that's a proper judicial
5 role, I would assume?

6 GENERAL PRELOGAR: I, of course, agree
7 with that, but I think Chevron is consistent
8 with that. The court polices the executive at
9 step one by ensuring that Congress's own choices
10 are put into operation, and it further polices
11 the executive at step two. As the Court said in
12 Kisor, reasonableness is a test that agencies
13 can fail. And so there's work to be done --
14 done there too to make sure the agency doesn't
15 transgress some outer bound or line that
16 Congress set.

17 JUSTICE KAVANAUGH: Thank you very
18 much.

19 CHIEF JUSTICE ROBERTS: Justice
20 Barrett?

21 Justice Jackson?

22 JUSTICE JACKSON: So just picking up
23 where Justice Kavanaugh left off, doesn't the
24 Court have to not only police the other branches
25 but itself as well? And by that I mean, to the

1 extent that the other side raises the concern
2 that, you know, they're treating law as policy,
3 isn't there a concern that policy questions
4 might be treated as law and that what Chevron is
5 doing is also helping the Court to police its
6 own determinations in that regard?

7 GENERAL PRELOGAR: Yes. And I think a
8 way to illustrate this is to think about a
9 delegation like the deceptive practices as
10 defined by the Secretary. If there were a
11 statute that said that, of course a court
12 couldn't come in and say, well, the Secretary
13 has said what's a deceptive practice, but I -- I
14 think that actually there's a better way to
15 think about the concept of what is deceptive
16 and, therefore, I'm going to override what the
17 agency has done or not give any weight to it.

18 Congress has directed there that what
19 you should do as a court is pay attention to
20 what the Secretary did because the Secretary was
21 given that role in administration. Obviously,
22 Chevron applies to circumstances where that
23 delegation is not quite as explicit. But it's
24 meant to identify the same basic idea where I
25 think the courts' role then is to give effect to

1 what Congress has done.

2 JUSTICE JACKSON: But why isn't the
3 answer what -- what the other side says, which
4 is, really, make Congress say that? In other
5 words, you know, it seems to me their argument
6 is when we're policing this line between what is
7 law and what is policy, we should require
8 Congress to say the Secretary gets to make this
9 decision, and when it doesn't, then I guess we
10 look at it as a legal question that the courts
11 can decide.

12 GENERAL PRELOGAR: So I think that
13 that argument would have more merit if there
14 weren't so much water under the bridge and the
15 fact that the Court explained when it would
16 identify this kind of delegation 40 years ago.
17 And, you know, Petitioners talked about the
18 reliance interests here and tried to diminish
19 them. They didn't talk about Congress's own
20 reliance interests in enacting statutes against
21 the backdrop of Chevron.

22 So I think at this juncture, to say
23 we're going to switch the default and make
24 Congress say discretion is conferred would be
25 really to run to the detriment of Congress's own

1 reasonable expectations with respect to
2 drafting.

3 And I think it also doesn't account
4 for the category of cases where the language
5 that Congress is using is infused with
6 discretion. They agree to terms like
7 "reasonable," "appropriate," "necessary." Those
8 are terms that require greater application to
9 concrete factual settings to fill in the
10 details, and you can't just interpret those
11 terms in a vacuum. So I don't understand how
12 this idea of just making Congress say it could
13 function in that kind of world.

14 And then the final thing is Congress
15 has said something very important here, which is
16 the agency shall administer the statute with
17 regulations or adjudications that have the force
18 of law. That is part of the statute as well.
19 And I think --

20 JUSTICE JACKSON: And you think that
21 that really carries a lot? I heard you use that
22 and focus on that many times when you're talking
23 about a situation in which deference is or
24 should be required.

25 GENERAL PRELOGAR: Exactly. So

1 Congress, in each and every statute where this
2 is going to be applicable, where Chevron
3 deference will even be available, is going to
4 have to have made that judgment in the statute
5 to give the agency that responsibility and role
6 in implementing the statute.

7 JUSTICE JACKSON: And let me just ask
8 you about whether or not -- going to the issue
9 of ambiguity, which has come up many times,
10 whether or not the Court could clarify when
11 there is a gap or ambiguity that allows for or
12 requires the court to -- to go to step two. And
13 what I'm thinking about is what I mentioned
14 previously with your friend on the other side,
15 which is that some scholars have actually
16 identified different kinds of ambiguity.

17 So in one scenario, we have a statute
18 that uses a broad term, and that term
19 encompasses a range of reasonable meanings.
20 There are three or four different ways that
21 could be reasonably -- you know, the meaning of
22 stationary source, for example.

23 But then there's also the kind of
24 ambiguity in which a statute can mean only one
25 thing, either A or B, perhaps because of the way

1 the -- the -- the language, you know, is put
2 forward in the statute. It's just unclear
3 whether it means A or B.

4 I take these scholars to mean that,
5 really, in -- the former scenario is the one in
6 which we have a situation, you know, where
7 Chevron deference would be required. And -- and
8 could the Court say something like that? And
9 let me just clarify. I mean, Chevron, I look at
10 it as that's reducing to a policy choice, that
11 once we are in the world of finding the kind of
12 ambiguity where there are a number of reasonable
13 alternatives in terms of making this
14 determination, then, you know, it's just going
15 to be a policy choice as to which one, you know,
16 Congress -- Congress wanted in some sense or
17 which entity Congress wanted to make that
18 decision.

19 GENERAL PRELOGAR: So I -- I think
20 that there -- certainly this Court could provide
21 more guidance to lower courts and, in
22 particular, identify the types of statutory
23 issues that might clearly connote discretion,
24 there are going to be some easy calls on this,
25 and the types of situations where there might be

1 multiple, possible ways to implement and play
2 that will signal that there really is a zone of
3 discretion and the agency should have some
4 flexibility.

5 My only concern with going down the
6 road of saying there's some fundamental
7 difference with respect to particular terms that
8 might be subject to only two possible ways to be
9 implemented is that, you know, there are kind of
10 an endless number of statutes out there and all
11 kinds of varieties. And I worry that it might
12 lose sight of certain contexts where Congress
13 actually was comfortable with either way of
14 implementing that particular term, even if there
15 are only two possibilities, and did, in fact,
16 delegate that issue to the agency.

17 So I wouldn't want some kind of, you
18 know, bright-line rule to diminish the courts'
19 ability to recognize and implement that kind of
20 delegation.

21 JUSTICE JACKSON: Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 General.

24 Mr. Martinez, rebuttal?

25

1 REBUTTAL ARGUMENT OF ROMAN MARTINEZ
2 ON BEHALF OF THE PETITIONERS

3 MR. MARTINEZ: Thank you, Your Honor.
4 Just a few points in rebuttal.

5 First of all, I think it's really
6 important to be very clear about what Chevron
7 does. It takes the power to say that the law --
8 what the law means, to say that the law means X,
9 and it takes that power away from courts and it
10 gives it to agencies. And it then forces
11 agencies -- forces courts to adjudicate the
12 rights of individual litigants that are in front
13 of them based on a version of the law that the
14 courts themselves do not believe is correct, do
15 not believe is the best interpretation.

16 Neither Congress nor this Court can
17 create a doctrine or legislate a statute that --
18 that effectuates that reallocation of
19 interpretive authority. My friend on the other
20 side said that the purpose of Chevron is to set
21 the ground rules on how the -- the different
22 branches of government should operate.

23 With respect, I think the Constitution
24 sets those ground rules. And the Constitution
25 makes clear that the judicial power, the power

1 to say what the law is, the power to interpret
2 the law, rests with courts, not with agencies,
3 and certainly not with Congress either. And I
4 think the APA reenforces that.

5 The Solicitor General tries to -- to
6 rescue or reconceptualize Chevron by I think
7 taking issue with our argument that under
8 Chevron, if the court thinks the best
9 interpretation is X, it sometimes is going to
10 have to apply Y because the agency told it too.
11 I think if you look at footnote 11 of Chevron,
12 that is exactly what Chevron itself says.

13 It tells the agency -- the court that
14 it has to apply an interpretation that the court
15 itself would not choose. In other words, an
16 interpretation that the court itself does not
17 think is best.

18 The Solicitor General also describes
19 Chevron as applying, and the formulation that I
20 heard a lot today is it applies if the agency
21 didn't resolve the question, which is a kind of
22 innocuous phrasing, but what is really meant by
23 that is that Chevron applies in cases of
24 ambiguity. And ambiguity has always been
25 understood as a situation where reasonable

1 people can disagree about what the law means.

2 And that just broadens the scope of
3 deference. Ambiguities are all over the place.
4 Courts resolve ambiguities all the time. That's
5 core to the interpretive function. And so
6 there's no reason to think that just because
7 Congress has accidentally left an ambiguity in a
8 statute, that what it's really trying to do is
9 have that ambiguity resolved by policy decisions
10 made by an agency.

11 Justice Barrett asked about the -- the
12 justification for Chevron and whether the intent
13 justification is really valid. And I took my
14 friend to -- to essentially concede that the
15 delegation is fictional, but nonetheless to say
16 that we should apply it anyway as a presumption.

17 I -- I -- I don't think that you can
18 get the mileage that you need to get out of the
19 intentional delegation theory after you've
20 conceded it's fictional because the only reason
21 that intentional delegation theory has weight is
22 if it's actually what Congress wanted to do.
23 And if Congress didn't actually want to delegate
24 it, then we shouldn't be, you know, basing our
25 doctrine and reconceptualizing how we think

1 about statutory interpretation based on this
2 fictional premise.

3 Here there's no reason to think that
4 Congress actually wanted to delegate
5 policy-making authority to agencies to resolve
6 ambiguity -- any ambiguity that arises in any
7 statute administered by the agency.

8 I think the government's sort of
9 solution to that problem is to propose a clear
10 statement requirement on Congress. Hey, you can
11 just legislate more clearly, but ambiguities are
12 -- are -- are accidental; they're unintentional.
13 And so I don't think that works. I think that
14 would impose a massive clarity tax on Congress
15 that's unjustified.

16 With respect to the history, Your
17 Honor, I think the mandamus precedents make very
18 clear themselves that they're talking about
19 remedies and those cases like Decatur and Dunlap
20 expressly say that if we were interpreting these
21 -- these legal issues in a different context
22 where we weren't limited by the limits on
23 mandamus remedies, we would apply our -- our
24 best and independent judgment.

25 With respect to the APA, the Solicitor

1 General is looking at text that requires courts
2 to interpret statutory provisions and -- and is
3 saying that that rule, interpret statutory
4 provisions, is consistent with Chevron, which
5 she describes in her brief as allocating
6 interpretive authority to agencies.

7 So the statute says courts do the
8 interpretation. Chevron says agencies get
9 interpretive authority, not courts. These are
10 inconsistent. Chevron's not consistent with the
11 APA.

12 Finally, with respect to the course
13 correction idea or the amend it, don't end it
14 approach, I would just respectfully suggest that
15 you've tried to amend this. You've tried to
16 course correct over and over again over the
17 years. That's why we have a Chevron doctrine.
18 It's overladen with a lot of bells and whistles.
19 It's very hard to apply in practice.

20 I think in -- in -- in the real world,
21 if you try to amend it without ending it, what's
22 going to happen is you're going to put a lot of
23 pressure on the major questions doctrine.
24 People are going to be coming to this Court
25 every three or four years asking you to adopt a

1 new limitation, a new caveat, a new threshold
2 test.

3 We would respectfully suggest that the
4 solution here is to recognize that the
5 fundamental problem is Chevron itself.
6 Interpretive authority belongs to the courts.

7 If we have the best view of the
8 statute, we should win this case. Thank you,
9 Your Honors.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel. The case is submitted.

12 (Whereupon, at 12:17 p.m., the case
13 was submitted.)

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